80-460

CASE NO. _____

Supreme Court, U. S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

JOSEPH FRANCIS MERLO,
RAYMOND PARKS,
HARRY BLACKFORD,

Petitioners,

—v—

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

1. Where affidavits submitted to a trial court identify specific portions of a search warrant which are material and necessary to a finding of probable cause but which are false, and proof of deliberate falsity or reckless disregard of truth by the search warrant affiant because of the inclusion of false information, or the omission of exculpatory or conflicting information within the knowledge of the affiant at the time the search warrant affidavit was drafted, is offered by reference, in an affidavit, to the sworn testimony of the affiant and his subordinate colleagues, and by reference to documents, referred to by the search warrant affiant, which were introduced as exhibits in a related case, has a sufficient showing of falsity or reckless disregard for the truth of material and necessary facts in the search warrant affidavit been made to require an evidentiary hearing to determine whether there have been Fourth Amendment violations?

2. Where a defendant enters a plea of no contest pursuant to plea bargaining negotiations in which no charges are dropped against the defendant and no concessions are made in a recommended sentence for incarceration and fines so that the sole predicate for the plea of no contest is a stipulation of facts which is to be tested for sufficiency of proof of the essential elements of the crimes charged, if the defendant is not permitted by an appellate court to challenge the sufficiency of the evidence presented in the stipulation of facts, does the right to due process guaranteed by the Fourteenth Amendment require that the convictions and sentences pursuant to a no contest plea be vacated and the case remanded to the trial court for further proceedings?

3. Where a search warrant fails to particularize the items to be seized except to direct seizure of documents which are evidence of the violation of a criminal statute which is extremely broad in scope

and vague in definition, is the warrant overbroad in violation of the requirements of the Fourth Amendment?

4. Are the requirements of the Fourth Amendment satisfied where a magistrate, in issuing a search warrant, relies solely upon conclusions drawn by a law enforcement officer involved in an investigation of possible criminal violations because of the alleged expertise acquired in the course of that investigation by the officer, rather than requiring the presentation of the underlying facts and circumstances to support the conclusions set forth in the affidavit for a search?

5. Is a state criminal statute violative of due process standards of the Fourteenth Amendment where that statute attaches criminal liability upon standards which are not defined by the statute because the statute does not provide clear notice of prohibited conduct and ascertainable standards of guilt?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners Joseph Francis Merlo, Raymond Parks and Harry Blackford pray that a writ of certiorari issue to the Ohio Supreme Court to review the judgment of that court which dismissed petitioners' appeal to that court for want of substantial constitutional question. The dismissal by the Ohio Supreme Court of the appeal thereby affirmed the judgment of the Ohio Court of Appeals for the Ninth Appellate District which affirmed petitioners' convictions in the Court of Common Pleas for Summit County, Ohio, for illegally conducting a bingo game, Ohio Revised Code §2915.09(A)(2), for theft, Ohio Revised Code §2913.02, and for gambling, Ohio Revised Code §2915.02.

OPINIONS BELOW

The judgment of the Ohio Supreme Court was rendered without opinion and was unreported. It is set forth in the Appendix at 36a-37a. The decision and journal entry of the Ohio Court of Appeals for the Ninth Appellate District

is unreported and is set forth in the Appendix at 1a-26a.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing petitioners' appeal as of right was entered on June 18, 1980. Appendix at 36a. On August 8, 1980, Mr. Justice Stewart granted an order extending the time within which to file a petition for a writ of certiorari from August 17, 1980 to and including September 16, 1980. Appendix at 38a.

This petition seeks review of a final judgment rendered by the Ohio Supreme Court, the highest court in the State of Ohio in which a decision could be had. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourth, Fifth, Sixth and the pertinent portion of the Fourteenth Amendment to the United States Constitution is set forth in the Appendix at 39a-41a. The text of Ohio Revised Code §§2913.02, 2915.01, 2915.02(A)(2), 2915.09(A)(2) and 2923.04 is set forth in the Appendix at 42a-87a.

STATEMENT OF THE CASE

On June 14, 1978, a four-count indictment was filed in the Common Pleas Court for Summit County, Ohio, charging the petitioners, Joseph Francis Merlo, Raymond Parks, Harry Blackford and five other persons with the crimes of engaging in organized crime (R.C. §2923.04), illegally conducting a bingo game (R.C. §2915.09(A)(2)), theft (R.C. §2913.02) and gambling (R.C. §2915.02). The issuance of the indictment occurred three days after massive, simultaneous raids were conducted by sheriff's deputies at various locations in Summit and Stark Counties.

The raids were conducted under color of seventeen search warrants which authorized the search of the two bingo halls, seven residences, including those of the petitioners, and eight automobiles. The warrants[1/] were all based upon a single

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[1/] Two search warrants which authorized the search of two autos were returned unexecuted.

"Affidavit for Search Warrant" (Appendix at 100a). Sheriff's deputies executed the warrants and seized papers, records and money from several of the residences. Large quantities of personal papers and effects were also seized from the petitioners' residences (see, e.g., 1T. 155,[2/] Pre-trial Order of Common Pleas Court, Appendix at 27a).

The search warrant affidavit was ostensibly based upon the intermittent surveillance of the bingo halls and the petitioners' residences by the affiant and deputies who he directed and by the affiant's review of bingo reports filed with the Office of the Ohio Attorney General by the bingo game operators. During the course of pretrial discovery and during the course of the separate trial of two of the petitioners' co-defendants, trial counsel for petitioners became aware of statements by the affiant in the warrant affidavit

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[2/] Record references are indicated by volume number, followed by T., followed by the page number.

which were in direct conflict with information in the bingo reports submitted to the Attorney General and in direct conflict with sworn testimony by the affiant and subordinate officers at the trial of petitioners' co-defendants.[3/] Thereafter, counsel for petitioners timely filed motions to suppress evidence obtained in the searches and seizures based in part on the argument that false statements, material to a finding of probable cause, were intentionally or recklessly included in the search warrant affidavit by the affiant, and facts within the knowledge of the affiant were intentionally or recklessly omitted. Affidavits in support of a request for an evidentiary hearing were filed by attorneys for petitioners (4T. 12-15, Appendix at 88a-99a) attesting to the clear conflict between the search warrant

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[3/] State v. Bruce Miller and Gary Hall, Summit County Common Pleas Court, Case No. 78-06-0663. Any record references to this transcript of the proceedings will be cited State v. Miller at __.

affiant's sworn testimony in a related trial, and between exhibits introduced at that trial, and specifically identified sections of the search warrant affidavit which were material and indispensable to any finding of probable cause.[4/] After an in camera inspection of the affidavits, the trial court overruled petitioners' motions for an evidentiary hearing (Pretrial Order of Common Pleas Court at 2, Appendix at 30a, 4T. 14).

Petitioners also filed pretrial motions to suppress seized evidence on grounds that the warrants were issued without probable cause (3T. 5) and that the warrants were overbroad because they permitted seizure of any evidence of engaging in organized crime, a broad and ill-defined statute (3T. 47).

[4/] Counsel for each petitioner submitted initial affidavits which were identical, or virtually identical. Supplementary affidavits were filed with the trial court by attorneys for petitioners Merlo and Parks. They were virtually identical in content. Petitioner Blackford joined in the supplementary affidavits (4T. 13).

Motions to dismiss the indictment were filed on behalf of the petitioners on the grounds that the organized crime statute (R.C. §2923.04)[5/] and the bingo statute (R.C. §2915.09(A)(2)) were unconstitutional because they violated federal due process standards (2T. 10, 2T. 15, Appendix at 119a-121a). Although the trial court found that deputies had seized items beyond the scope of the warrant at many of the locations searched (Pretrial Order of Common Pleas Court 2-5, Appendix at 27a-28a), the trial court overruled the motions to suppress.

5/ The organized crime statute, R.C. §2923.04, subsequently was found to be unconstitutional by the Ohio Supreme Court in an unrelated case, State v. Young, 62 Ohio St. 2d 370 (1980).

The trial court also overruled all facets of the motion to dismiss (Pretrial Order of Common Pleas Court, Appendix at 29a , 30a).

Following completion of the trial of two of petitioners' co-defendants (State v. Bruce Miller and Gary Hall), petitioners and the remaining co-defendants entered into plea bargaining negotiations with the prosecution. Early in the plea bargaining negotiations, it was clear that a negotiated no contest plea was completely contingent upon whether the parties could agree to a stipulation of facts. It was clear to the parties that petitioner Merlo's contention would be that, upon the facts which were to be stipulated by the parties, there was insufficient proof of any crime committed by Joseph Merlo. At a March 12, 1979 proceeding, the prosecutor reported to the trial court on the progress of the plea bargaining negotiations:

> "Okay. Now, underlying the entire --an underlying part of this agreement with regards to all six Defendants is that 9:00

o'clock on Wednesday morning, all Counsel are going to meet in the Prosecutor's Office to see whether or not we can agree upon the underlying factual basis for the no contest pleas, allow all Counsel and the State to feel that the appeal rights have been adequately preserved in that entire matter. It is contingent upon us agreeing on Wednesday, and if we are in agreement, we will be here at 1:30 on Wednesday for pleas. If not, we will be here at 9:00 o'clock, Thursday morning to pick a jury." (5T. 29).

After a brief exchange, the prosecutor repeated the understanding:

"[U]nderlying this entire agreement is our ability to agree on the procedure and factual basis underlying the pleas because there will probably be appeals in this case because everybody is pleading no contest. And if we agree on this meeting to be held at 9:00 o'clock, Wednesday morning in my office, we will be here at 1:30 on Wednesday for pleas.

"If we cannot agree on it, we will be here at 9:00 o'clock, Thursday, for jury selection." (5T. 30).

On Wednesday, March 14, 1979, the prosecutor reported to the court that an agreement on stipulated facts had been reached. The prosecutor briefly described the

agreement on negotiated pleas to the court and stated:

> "And Defendants--I would state to the Court--do intend to have--indicated the desire that they do intend to perfect their appeals after the findings--if and when the Court makes findings of guilty and sentences with regards to these no contest pleas." (5T. 35, emphasis added).

Moments later, in an exchange concerning stays pending appeal, the trial court stated:

> "Stay would be granted, if the Court would find guilty." (5T. 36, emphasis added).

Each defendant thereafter entered pleas of no contest pursuant to the plea bargain agreement with the prosecutor.

Petitioner Harry Blackford pleaded no contest to the counts charging illegally conducting a bingo game, grand theft and gambling, and the trial court granted dismissal of the charge of engaging in organized crime (5T. 55, 58). Petitioner Raymond Parks also pleaded no contest to charges of illegally conducting a bingo game, grand

theft and gambling, and the Count I charge of engaging in organized crime was dismissed (5T. 62). The prosecutor's recommended sentence for Blackford and Parks was probation.

The plea bargain for Joseph Merlo did not include dismissal of the organized crime count (5T. 26, 32-33), nor did it include a recommendation for leniency in sentencing. Rather, the prosecution recommended maximum sentences of incarceration and fines for each of the crimes charged (5T. 26, 32-33). Pursuant to the agreement on the stipulation of facts, petitioner Merlo pleaded no contest to all four counts of the indictment (5T. 41-42).

The prosecutor then recited the stipulation of facts that had been agreed upon. The stipulation of facts included most of the transcript of the State's evidence and exhibits received in the related case of State v. Bruce Miller (5T. 65-66, 73).

The prosecutor's theory in the case was that the petitioners were all involved

to some extent with other named co-defendants in the operation of two bingo halls. Petitioner Raymond Parks allegedly ran one hall and petitioner Blackford allegedly ran the other. Each hall was associated with two churches which held Ohio licenses to run bingo games on two nights per week. Raymond Parks and Harry Blackford allegedly managed supply companies which provided the games with all of the necessary supplies. The prosecution contended that the churches were overcharged for the supplies, in violation of the gambling statutes.

Further, the prosecution sought to prove that petitioner Joseph Merlo, with his wife, his sister, and with petitioner Parks' wife, aided petitioners Parks and Blackford in the transportation of cash receipts from the games at the halls and that this money was improperly withheld or "skimmed" from the churches.

The stipulation of facts was almost entirely derived from surveillance and the

searches and seizures. The transcript of the State's case in State v. Miller included the testimony of three members of the sheriff's department concerning the surveillance which was conducted intermittently, during a two-month period, for a total of only seventeen days, from inside unmarked cars parked at varying distances from the places being watched (See, e.g., State v. Miller at 359, 399). Surveillance never showed movement of persons or packages from the bingo hall to the Merlo residence, although several of the co-defendants were seen arriving and leaving at the apartment building where petitioner Merlo and his wife resided (E.g., State v. Miller, 361, 365, 373-375, 407, 410).

There were only two occasions when surveillance disclosed that petitioner Merlo was even at home. On April 19, 1978, detectives photographed Joseph Merlo as he parked his car in front of 1342 Weathervane Lane

(State v. Miller, 366). No further activity by any of the co-defendants was observed on that day. On April 30th, Joseph Merlo was seen driving away from the Weathervane Lane apartment (State v. Miller, 409). Later, Joseph Merlo returned to Weathervane Lane in the company of Raymond Parks; Merlo was observed holding a green cloth object in his hand. Officers speculated that it was a bank bag. Raymond Parks left with his wife Cecilia who had arrived earlier (State v. Miller, 411). A short time later, Joseph and Nancy Merlo left their apartment and drove off (State v. Miller, 411).

Among the exhibits introduced as part of the prosecution's case were a brown metal file box (State Ex. 29), a brown vinyl attache case (State Ex. 30), and a brown paper bag with ledger books (State Ex. 31), all of which were seized during the search of the apartment of Joseph and Nancy Merlo at 1342 Weathervane Lane (State v. Miller, 384-386). The brown metal box and the brown

vinyl attache case contained receipts and papers from AAA Concessions Company which operated the concession stands at the bingo halls (2T. 313, 342-346). Labels on the ledger books connected them with the bingo halls (5T. 71). However, the handwriting in the ledger books subsequently was identified by a handwriting expert as that of Merlo's wife (5T. 71), as was the handwriting in an address book seized from the Merlo apartment (5T. 71). None of the evidence seized from any of the locations was connected to Joseph Merlo, by handwriting analysis or otherwise.

Other than the surveillance testimony described above, the only evidence concerning Joseph Merlo was the testimony of a worker at one of the bingo halls. She testified that she knew Merlo prior to working at the bingo halls (State v. Miller, 312). She stated that on the day people were being hired to work at one of the bingo halls, she

saw Merlo at the hall (State v. Miller, 313). Raymond Parks and Harry Blackford were also at the hall (ibid.). The worker was not asked to explain, nor did she explain, what, if anything, Merlo did at the hall on that one occasion. That was the total evidence contained in the stipulation of facts against petitioner Merlo, other than the fact that his wife, his sister, and several acquaintances were implicated in the bingo operation.

After the stipulation of facts was presented by the prosecutor, counsel for petitioner Merlo moved for judgment of acquittal:

> "[W]e would urge that the Court enter a judgment of acquittal on the basis of the fact that none of the charges have been proved on the basis of the recital of facts which the prosecution has just stated to the Court." (5T. 76-77).

No objection was entered by the prosecution to petitioner Merlo's motion for acquittal; indeed, because it was anticipated. The trial court, however, overruled the motion

(5T. 79) and sentenced Merlo, Parks, Blackford and their co-defendants to the sentences recommended by the prosecutor.

Thus, the trial court found appellants Raymond Parks and Harry Blackford guilty of illegally conducting a bingo game, grand theft and gambling, and sentenced each of the petitioners to suspended concurrent imprisonment of two to ten years for grand theft and six months for gambling. The trial court also imposed a fine of $3,500.00 on each appellant and placed Parks and Blackford on probation for a period of two years (5T. 80-83). Petitioner Merlo was found guilty of all four counts in the indictment (5T. 83). The trial court sentenced appellant Merlo to concurrent terms of imprisonment of five to twenty-five years for engaging in organized crime, three to ten years for illegally conducting a bingo game, two to five years for grant theft and six months for gambling. Joseph Merlo was also

fined $18,000.00 in connection with the four counts in the indictment (5T. 85-86). Execution of sentences was stayed pending appeal (5T. 78, 79, 80, 81, 83, 86).

On appeal, the court of appeals held that petitioner Merlo could not test the denial of his motion for acquittal, pursuant to a plea of no contest (Opinion of Court of Appeals, Appendix at 5a-14a). However, the court did not vacate the convictions and the plea and remand for further proceedings. The appellate court simply affirmed Merlo's convictions.[6/]

[6/] Although the court of appeals overruled petitioner Merlo's argument that the organized crime statute (R.C. §2923.04) was unconstitutional (Opinion of Court of Appeals, Appendix at 20-21a), the court, sua sponte, reversed petitioner Merlo's conviction on Count I for engaging in organized crime and dismissed that count because Merlo had been convicted of the substantive crimes in Counts II, III and IV. (See, Opinion of Court of Appeals, Appendix at 24a). Subsequently, in an unrelated case, the Ohio Supreme Court held that the organized crime statute, R.C. §2923.04 was unconstitutionally vague, in violation of the Fourteenth Amendment (State v. Young, 62 Ohio St. 2d 370 (1980)).

The court of appeals also overruled petitioners' arguments that the trial court erred by not granting an evidentiary hearing on the question of intentional or reckless inclusion of false material statements in the search warrant affidavit. The court held the affidavits by counsel which referred to the search warrant affiant's testimony in the related case of State v. Miller were procedurally insufficient because they were "hearsay statements" (Opinion of Court of Appeals, Appendix at 19a). The court also overruled arguments concerning the lack of probable cause for the issuance of the warrants and the overbreadth of the warrants (Opinion of Court of Appeals, Appendix at 15a-18a). The Court denied petitioners' assignments of error that the bingo statute, §2915.09(A)(2), violated Fourteenth Amendment due process standards. The court held that petitioners could not complain of the vagueness of §2915.09(A)(2) because the

facts showed that they violated other provisions of the statute (Opinion of Court of Appeals, Appendix at 22a). However, the court failed to note that petitioners were charged in Count II only with a violation of 2915.09(A)(2), and not with other sections of the statute (which were only misdemeanors).

With the exception of the court's sua sponte reversal of petitioner Merlo's conviction for engaging in organized crime (see, footnote 5, supra, at 18), the court of appeals denied all assignments of error and affirmed petitioners' convictions (Appendix at 25a).

Petitioners' subsequent appeal to the Ohio Supreme Court was dismissed without opinion (Appendix at 36a).

REASONS FOR GRANTING THE WRIT

I. AN IMPORTANT QUESTION FOR REVIEW IS PRESENTED, INVOLVING THE NEED FOR CLARIFICATION OF THIS COURT'S DECISION IN FRANKS V. DELAWARE, 438 U.S. 154 (1978), CONCERNING THE ENTITLEMENT TO AN EVIDENTIARY HEARING ON THE QUESTION OF FALSE STATEMENTS INCLUDED INTENTIONALLY, OR WITH RECKLESS DISREGARD FOR THE TRUTH, BY THE AFFIANT IN A SEARCH WARRANT AFFIDAVIT WHERE THE FALSE STATEMENTS ARE MATERIAL AND NECESSARY TO A FINDING OF PROBABLE CAUSE.

In Franks v. Delaware, 438 U.S. 154 (1978), this Court held that

> "Where a defendant makes a substantial showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. at 155-156.

In the instant case, petitioners carefully followed the procedures required by Franks. The affidavits of petitioners' counsel set forth specific "allegations of deliberate falsehood or reckless disregard for the truth." (Affidavit, paragraph 2,

Appendix at 95a, Supplementary Affidavit, paragraph 4, Appendix at 89a). Furthermore, the allegations were supported by specific reference to "the portion of the warrant affidavit that [was] claimed to be false." The affidavit pointed to falsehoods in the affiant's claim of illegal activity and to falsehoods in the allegation of the transportation of bingo receipts. (Affidavit, paragraphs 3 and 4, Appendix at 96a, Supplementary Affidavit, paragraphs 5, 6, 7, Appendix at 89a-90a).

"Supporting reasons" required by Franks for the claim of falsity were provided and the sources of proof of those reasons--the sworn testimony, in the related case of State v. Miller, of the affiant and detectives who affiant supervised, and reference to State Exhibits in State v. Miller (bingo operators' reports to the Attorney General - SX. 1, 2; summary of audits - SX. 3)--were also provided in counsel's affidavits. Reference to the bingo operators' reports to the Attorney

General supplied an offer of proof that material facts had been omitted. If the statements which were attacked as deliberately or recklessly false had been omitted, the affidavit in support of the search warrants clearly would have failed to set forth sufficient facts of underlying circumstances to support a finding of probable cause. In fulfilling this last requirement of Franks, the appellants met every requirement of the Franks test.

Counsel's affidavits did not include affidavits or sworn statements of witnesses simply because the affidavits pointed to the sworn testimony of the affiant and other detectives who were prosecution witnesses in the related case of State v. Miller to demonstrate that the allegations of appellants' counsel were substantial.

However, despite petitioners' substantial showing, the lower courts refused to recognize petitioners' right to an evidentiary hearing.

Since the decision in Franks, lower court decisions have shown a continued lack of uniformity in the availability of an evidentiary hearing on the question of the inclusion of false statements in a search warrant affidavit. Some courts have ordered evidentiary hearings without requiring a substantial showing by the defendant or without assessing whether the allegedly false statements were necessary to a finding of probable cause. See, State v. Louchheim, 296 N.C. 314, 250 S.E. 2d 630 (1979). Cf. United States v. Martin, 615 F.2d 318, 328 (5th Cir. 1980). Other courts, such as the lower courts in the instant case, have required much more than the "substantial showing" set forth in Franks to permit an evidentiary hearing to be held. In the present case, although the petitioners' attorneys supplied numerous examples of false statements in the search warrant affidavit, the appellate court denied petitioners an inference that the false statements were made intentionally

or recklessly. In effect, the court required petitioners to prove their entire case through an adverse witness, the affiant, in advance of an evidentiary hearing. Barriers to evidentiary hearings, such as those erected by the courts in this case, are totally contrary to the aim of the Franks decision.

Moreover, while the Franks decision dealt with the inclusion of false statements in a search warrant affidavit, this Court did not decide whether a showing of the omission of exculpatory facts, or facts otherwise material to the question of probable cause required an evidentiary hearing. Although several federal and state courts have determined that an evidentiary hearing should be held on the question of omission of material facts, where a sufficient showing has been made (e.g., United States v. Park, 531 F.2d 754 (5th Cir. 1976), United States v. House, 604 F.2d 1135 (8th Cir. 1979)), this Court's guidance would resolve a

question of great significance to rights guaranteed by the Fourth Amendment and left undecided by the Franks decision.

Review of the question presented in this case would provide needed clarification of the Franks decision which, in turn, would have a salutary effect upon the already severely strained resources of the criminal justice system by eliminating unnecessary evidentiary hearings while assuring availability of an evidentiary hearing where a proper showing has been made. Because of the importance of the question presented herein, a writ of certiorari should be granted.

II. AN IMPORTANT QUESTION IS PRESENTED FOR REVIEW CONCERNING WHETHER CONVICTIONS AND SENTENCES ENTERED PURSUANT TO A NO CONTEST PLEA IN STATE CRIMINAL PROCEEDINGS MUST BE VACATED UNDER DUE PROCESS REQUIREMENTS WHERE THE SOLE PREDICATE TO THE DEFENDANT'S PLEA OF NO CONTEST PURSUANT TO PLEA BARGAINING NEGOTIATIONS IS A STIPULATION OF FACTS WHICH IS INTENDED TO BE TESTED FOR SUFFICIENCY OF PROOF OF THE ESSENTIAL ELEMENTS OF THE CRIME CHARGED, BUT THE DEFENDANT, AFTER ENTRY OF THE PLEA,

IS NOT PERMITTED TO CHALLENGE THE SUFFICIENCY OF THE EVIDENCE PRESENTED IN THE STIPULATION OF FACTS.

In the present case, petitioner Joseph Merlo entered pleas of no contest to all counts of a four-count indictment pursuant to an agreement reached in plea bargaining negotiations. No reduction in charge or leniency in sentence was involved in the plea bargain. Petitioner Merlo was charged with four crimes and he pleaded no contest to all four crimes (5T. 83). Further, under the terms of the plea bargain, the prosecutor recommended that maximum imprisonment and maximum fines be imposed in sentencing (5T. 26, 32-33). The only basis for the no contest pleas by petitioner Merlo, was that the pleas were conditioned upon agreement by petitioner and the prosecution to a stipulation of facts (5T. 29-30) and the trial court would make a finding of guilt or innocence based upon that stipulation of facts (5T. 35, 38, 83).

After recital of the stipulation of facts by the prosecution (5T. 65-74),

appellant Merlo moved for judgment of acquittal on all counts of the indictment (5T. 76), but the motion was denied by the trial court (5T. 77). After findings of guilty based upon the stipulation of facts were made by the trial court (5T. 83), the sentence previously recommended by the prosecution (see, 5T. 26, 32-33), was imposed by the trial court (5T. 85-86).

On appeal, appellant Merlo assigned as error that judgment of acquittal should have been entered by the trial court on all counts of the indictment, based upon the stipulation of facts which was presented to the trial court. The court of appeals denied the assignment of error and affirmed appellant Merlo's convictions on the basis that the agreement between Merlo and the prosecutor contemplated an invalid procedure because a no contest plea does not permit a defendant to challenge the sufficiency of evidence contained in a stipulation of facts (Opinion of Court of Appeals, Appendix at 12a); despite the fact that the only basis for the with-

drawal of appellant Merlo's plea of not guilty and the entry of a no contest plea was agreement upon a stipulation of fact from which the trial court would make a finding of guilt or innocence.

This Court has recognized that plea bargaining is an essential part of the administration of justice.

> "If every criminal charge were subjected to full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." Santobello v. New York, 404 U.S. 257, 260 (1971).

However salutary the effect of plea bargaining is on the functioning of the criminal justice system, this Court has repeatedly stated that there must be safeguards to insure considerations of due process in the securing of an agreement between a defendant and the prosecution. See, Brady v. United States, 397 U.S. 742 (1970); Moore v. Michigan, 355 U.S. 155 (1957).

Included among the due process safeguards to plea bargaining is the requirement

that a defendant must receive the benefits of the plea bargain in exchange for the plea which is entered. In Santobello v. New York, 404 U.S. 257 (1971), the United States Supreme Court held that:

> "[T]he adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262 (Emphasis added).

The court in Santobello went on to hold that the prosecution's breach of a plea bargaining promise entitled the defendant to either specific performance of the agreement or the vacating of the plea. 404 U.S. at 263.

The plea bargaining negotiations in this case centered on whether the prosecution and appellant Merlo could agree to a stipulation of facts upon which the trial court would make a finding of guilt or innocence. There

was no other purpose to the stipulation of facts. If, as the court of appeals contended, the agreement between Merlo and the prosecution was invalid because the trial court was without power to accept a no-contest plea contingent upon the weighing of a stipulation of facts, then the court of appeals should have vacated the convictions and sentences and remanded for further proceedings. In holding petitioner Merlo to his pleas of no contest while ignoring the conditioned basis for the entry of such pleas, the court of appeals denied petitioner Merlo due process protections of the Fourteenth Amendment.

Although lower court decisions are in agreement with the Court's decision in Santobello v. New York, supra, that a prosecutor's promise must be fulfilled when a plea is based upon that promise and is induced by that promise, there is some question as to whether a defendant is entitled to relief where a prosecutor has made promises beyond his power to fulfill. In Palermo v. Warden,

Green Haven State Prison, 545 F.2d 286 (1976), the Second Circuit Court of Appeals held that the reasoning of Santobello required that relief be afforded to a defendant who was induced to a plea by a prosecutor's promise which was unfulfillable. Id., 545 F.2d at 296. That decision was in agreement with the Fourth Circuit Court of Appeals' position enunciated in United States v. I. H. Hammerman, II, 528 F.2d 326 (4th Cir. 1975).

However, this case presents an appropriate vehicle to further clarify the protection which surrounds a process which is absolutely essential to the orderly and effective functioning of the criminal justice system. Although the protections afforded defendants through this Court's decision in Santobello were substantial, this Court should should emphasize that a defendant is entitled to relief from a bargained plea, where a promise is breached, regardless of whether the prosecutor's promise which induced the plea was within the prosecutor's power to fulfill. Therefore, petitioner respectfully urges

this Court to grant review of this case.

III. AN IMPORTANT QUESTION IS PRESENTED FOR REVIEW CONCERNING WHETHER THE PARTICULARITY REQUIREMENTS OF THE FOURTH AMENDMENT ARE SATISFIED WHERE A DESCRIPTION PROVIDED BY THE WARRANT OF ITEMS TO BE SEIZED DIRECTED SEIZURE OF BOOKS AND RECORDS THAT WERE EVIDENCE OF A VIOLATION OF A CRIMINAL STATUTE WHICH WAS EXTREMELY BROAD IN SCOPE AND VAGUE IN DEFINITION.

On June 9, 1977, a judge of the Summit County Common Pleas Court issued search warrants authorizing the search of two businesses, seven residences and eight automobiles. The homes and automobiles of the petitioners were searched pursuant to those warrants and numerous items were seized pursuant to the language of the search warrants all of which contained the same description of the things which could be seized:

> "[F]or certain property, namely:
>
> 1. Supplies, books and records and proceeds of illegal games and gambling paraphernalia, which is evidence of the commission of a criminal offense, or the fruits of that crime, to wit: Engaging in Organized Crime and Conducting

an Illegal Bingo Game." (Emphasis added).

Pursuant to the broad authorization of the warrant, members of the Sheriff's department seized hundreds of items, including numerous personal effects of each of the petitioners. Indeed, the trial court specifically ordered the return of many items which it found were improperly seized (Pretrial Order of Common Pleas Court, Appendix at 27a, See also, T. 155).

In the instant case, the warrants were constitutionally defective because they allowed virtually unrestricted discretion by the officer executing the warrant as to what was to be seized.

The crime of Engaging in Organized Crime, set forth in R.C. §2923.04, was extremely broad in scope and vague in definition. Indeed, so vague in definition that the Ohio Supreme Court recently found the statute to be unconstitutionally vague, in violation of due process protections of the

Fourteenth Amendment. State v. Young, 62 Ohio St. 2d 370 (1980). The Ohio Supreme Court described the impermissible scope of the statute as reaching the facilitation of any activities of a criminal syndicate whether legal or illegal. The court felt virtually any activity fell within the statute's reach. 62 Ohio St. 2d at 376-376. Furthermore, the court emphasized that because the definition of a criminal syndicate included "five or more persons collaborating to promote or engage in any offense for the purpose of gain" (R.C. §2923.04(C)(7)), the statute, again, had virtually limitless scope because of its vagueness. 62 Ohio St. 2d at 378.

Thus, it becomes clear that an officer, authorized to search for evidence of Engaging in Organized Crime, was given unlimited discretion to conduct a general, exploratory search for evidence of any criminal offense identified in the criminal statutes. The offense of Engaging in Organized Crime was

in no manner restricted to only bingo related activity. The fact that the officers often ventured far from items connected with bingo (See, Pretrial Order of Common Pleas Court, Appendix at 27a), underscores the limitless direction of the warrant. The only limitation in the warrant (actually, no limitation at all) was that the property to be seized be roughly classified as "supplies, books and records."

Clearly, the warrants in this case do not meet the standards of particularity approved by this Court in Andresen v. Maryland, 427 U.S. 463 (1976). In rejecting the argument that the warrants in that case were rendered general warrants because of the inclusion of the phrase, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown," the Court stated that that phrase should be read with preceding language which was highly particularized. 427 U.S. at 481-482. However, the particularization present in the Andresen

warrants simply was not present in the warrants in the instant case. Moreover, mere inclusion of a crime of conspiracy does not render a warrant invalid, if sufficient particularity is supplied to define the crime of conspiracy. Thus, in reversing a suppression order granted by a district court because of the overbreadth of a search warrant, the Circuit Court of Appeals for the District of Columbia held that authorization to seize evidence of "conspiracies to steal government property and obstruct justice" did not run afoul of the particularity requirement of the Fourth Amendment because the warrant authorization was specifically referenced to an accompanying affidavit which defined the "conspiracies" with sufficient particularity. In re Search Warrant Dated July 4, 1977, 572 F.2d 321 (D.C. Cir. 1977), cert. den. 435 U.S. 925 (1978). However, the fatal flaw in this case is the failure to provide any further particularization beyond the reference to two criminal statutes.

This case presents an appropriate opportunity to the Court to supply additional guidance to federal and state trial courts and federal and state law enforcement agencies in an area of great complexity. This case presents another facet of the problem confronted in Andresen and it remains for this Court to supply the sorely needed clarification on a question of vital importance to the criminal justice system and to the rights of every citizen of the United States. Therefore, petitioners respectfully urge the Court to accept this question for review.

IV. AN IMPORTANT QUESTION FOR REVIEW IS PRESENTED CONCERNING WHETHER THE FOURTH AMENDMENT REQUIREMENTS ARE MET WHERE A MAGISTRATE, IN ISSUING A SEARCH WARRANT, RELIES SOLELY UPON CONCLUSIONS DRAWN BY A LAW ENFORCEMENT OFFICER, RATHER THAN REQUIRING A PRESENTATION OF THE UNDERLYING FACTS AND CIRCUMSTANCES TO SUPPORT THOSE CONCLUSIONS.

This Court has recently affirmed that

> "The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police

obtain a warrant from a neutral and disinterested magistrate before embarking upon a search." Franks v. Delaware, 438 U.S. 154 (1978).

Justice Jackson made clear the elemental values behind this requirement:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right

> of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." Johnson v. United States, 333 U.S. 10, 14 (1948) (footnotes omitted).

However, in the instant case, the court of appeals permitted the bulwark of protection to be breached by permitting a dilution of the requirement that probable cause for the issuance of a warrant must be demonstrated to a neutral magistrate by setting forth facts and circumstances supporting law enforcement officers' beliefs. In the instant case, rejecting petitioners' arguments that the search warrant affidavit contained only conclusory allegations insufficient to show probable cause, the court of appeals held that a law enforcement officer's "opinions concerning [crime] should be considered in affidavits for search warrants. The issuing magistrate must distinguish between pure conclusory statements and opinions based upon an expert's knowledge and experience." (Opinion of Court of Appeals, Appendix at 16a). The court of appeals went on to hold

that because the expert officer had reviewed documents and had observed actions, the officer's opinions were sufficient to support probable cause for a warrant (ibid.).

In the very first paragraph of the affidavit for the search warrant, the officer claimed that the crimes of Illegal Bingo (R.C. §2915.09) and Engaging in Organized Crime (R.C. §2923.04) were being committed at two bingo operations, and that evidence or fruits of those crimes would be found in the seventeen locations for which search warrants were sought. In the remainder of the first two pages of the affidavit, the officer provided details of the places to be searched.

In order to support his claim that crimes were being committed, the affiant posited three theories of illegal conduct: (1) that attendance at the two bingo operations was understated and, as a consequence, the gross receipts of the games were understated; (2) the two churches which held the licences for the Friday and Saturday night

games were being cheated because those nights were "more lucrative"; and (3) the churches which held the licenses to conduct bingo games were being charged excessive and inflated prices for supplies by the operators. The "facts" for his second theory were contained in paragraph number four. The officer set forth the "facts" for his third theory in one sentence for each bingo operation. The remainder of the "fact" section of the affidavit was used to describe the first theory concerning attendance and the supposed interrelationship of the places to be searched.

In order to show that the attendance and, thereby, the gross receipts were being misstated, the officer claimed that "crowd estimates" by deputy sheriffs on "twenty plus times"(during the course of fourteen (14) months - April, 1977, to June 1978) ranged "from 400 to 650 people." Conspicuously absent from the affidavit was any description of how the "estimate" was obtained, whether it was a simple guess, or an attempt to

count heads, or counting empty chairs. Nothing was supplied to describe the process of the estimates. The "estimates" were, thus, thinly veiled hearsay conclusions.

The affiant juxtaposed the crowd estimates against the claim that the bingo operators reported to the Attorney General a crowd of 300 to 400 people per night. His conclusion from these "facts" is that the operators' reports were "inconsistent with the estimates of the Sheriff's Department, and the actual counts taken by the Attorney General during their formal audits" (emphasis supplied, affidavit page 3, paragraph 2). The latter statement is particularly astounding in light of the total absence of any attendance figures from the Attorney General's audits. Indeed, the officer even failed to indicate whether the crowd estimates and the audits covered the same time period as that for which the operators submitted reports.

The affiant concluded the third paragraph by contrasting the average daily gross

receipts of $4,174.00, reported by the operators of the Lakemore Plaza bingo game to the Attorney General, with a figure of $6,000.00 to $9,000.00 in gross receipts which was the product of the Sheriff's Deputies' crowd estimates multiplied by the affiant's per player expenditure estimate. However, this comparison was meaningless, not only because of the lack of factual support for the crowd estimates, but also because if the spending estimate of $15.00 is multiplied times the bingo operators' reported average crowd of 300 to 400 people per night, the result of $4,500.00 to $6,000.00 is completely consistent with the Attorney General's listed audits of gross receipts of the Mahoning Road bingo game: $4,442.50, $5,924.50, $6,383.95, $4,795.75. Certainly, no taint of illegality was shown by these figures.

It is abundantly clear that the officer's theory of illegality because of misstatement of attendance and gross receipts was grounded on unsupported, conclusory statements.

Moreover, the few facts which were provided in paragraphs two and three were completely consistent with the conclusion that the games were operated legally.

The officer's second theory of illegality was set forth in paragraph four on pages three and four of the affidavit. He implied that the churches holding licenses for Friday and Saturday nights were cheated because they received money payments which were less than or the same as the payments to churches holding the bingo licenses for Thursdays and Sundays, and Friday and Saturday nights were "substantially more lucrative" than the others. Nowhere did affiant provide any facts to support this statement about the "lucrative" nature of Friday and Saturday nights. Furthermore, the audit of the Lakemore game on Thursday, March 23, 1978, referred to in the affidavit, contradicted that claim and demonstrated substantially higher receipts than the March 24, 1978, audit of the Lakemore game on a "lucrative" Friday night.

The third and final theory concerning illegality was that the bingo operators ran supply companies which overcharged the churches for supplies. However, nothing was supplied to the magistrate in order for the magistrate to reach his own, constitutionally mandated, independent conclusion concerning the prices charged.

Nothing else in the entire affidavit lends any support to a finding of probable cause for the issuance of the search warrants. Paragraph number 5 details the alleged transportation of the money and records from the bingo halls through the various homes and places which were sought to be searched. However, the transportation of money and records set forth in the affidavit is equally suggestive of innocent as well as criminal conduct.

Although affidavits are not to be read in a hypertechnical manner, United States v. Ventresca, 380 U.S. 102 (1965), the affiant in this case had the aid of prosecutors to

develop the facts necessary for a showing of probable cause. Furthermore, the affidavit makes clear that the investigation of these games had been going on for at least fourteen months. This clearly cannot be said to be a case of an affidavit "drafted by nonlawyers in the midst and haste of a criminal investigation." United States v. Ventresca, supra, 380 U.S. at 108. There is no doubt in this case that the showing of illegality in this affidavit is attempted only through conclusory statements. Unable to recite facts, the affiant and prosecutors relied on the quantity of sentences and paragraphs to support their allegation of probable cause. The only true "facts" in this affidavit described purely innocent behavior.

Viewed in its entirety, this affidavit utterly fails to set forth sufficient facts to allow an independent, detached magistrate to draw his own conclusions concerning probable cause. At every critical juncture in the affidavit where an allegation of illegality

is made, the affidavit contains nothing more than bald, conclusory statements. In some instances, the conclusions are strung together to reach further unsupported conclusions. Clearly the affidavit in this case was insufficient to support probable cause and the items seized should have been suppressed. Mapp v. Ohio, 367 U.S. 643 (1961).

As the court of appeals opinion in this case clearly demonstrates, this Court's pronouncements in United States v. Ventresca, supra, have been miscontrued. Subsequent decisions by this Court have emphasized the central role that an independent magistrate's determination of probable cause plays in safeguarding Fourth Amendment rights. Continued misinterpretation of Ventresca by lower courts will continue to defeat this Court's attempts to supply guidance to a complex and important question of constitutional law. Therefore, the Court should accept the question presented for review and upon review reverse the judgment of the courts below.

V. AN IMPORTANT QUESTION IS PRESENTED FOR REVIEW CONCERNING WHETHER A STATE CRIMINAL STATUTE VIOLATES THE FOURTEENTH AMENDMENT WHERE CRIMINAL LIABILITY ATTACHES UNDER THE STATUTE UPON STANDARDS WHICH ARE NOT DEFINED.

During pretrial proceedings, petitioners Merlo, Parks and Blackford moved to dismiss count 2 of the indictment, conducting an illegal bingo game, R.C. §2915.09)(A)(2), because the statute was unconstitutionally vague (2T. 15-16, 5T. 63). On appeal, appellants' assignments of error were overruled.

R.C. §2915.09(A)(2) provides:

> "Sec. 2915.09. (A) A charitable organization that conducts a bingo game shall:
>
> "...(2) Use all of the gross receipts from the bingo game for paying prizes, for the charitable purposes listed in its bingo license application, for purchasing or leasing bingo cards and other equipment used in conducting the bingo game, hiring security personnel for the bingo game, or advertising the bingo game provided that the amount of the receipts so spent is not more than is customary and reasonable for a similar purchase, lease, hiring,

> or advertising, for renting premises in which to conduct the bingo game, and for the maintenance, expense, and cost of a building owned by the charitable organization in which the bingo game is conducted, except that, for each bingo session, the total amount of the gross receipts used for the maintenance, expense, and cost of the building shall not exceed the lesser of two hundred fifty dollars or twenty-five per cent of the gross receipts from the session."

Although the statute lists various expenses which are allowed while conducting a charitable bingo game, the legality of the expenditures rests solely upon the meaning of the phrase:

> "provided that the amount of the receipts so spent is not more than is customary and reasonable for a similar purchase, lease...."

Nowhere in the remainder of the section or in other sections of the Ohio bingo statutes are the phrases "customary and reasonable" and "similar purchases" defined. As a result, one who is conducting a charitable bingo game is given no guidance as to what conduct is prohibited and must guess at its meaning.

In United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921), this Court reviewed the constitutionality of a federal law which prohibited:

> "any person willfully...to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries;... (e) to exact excessive prices for any necessaries...." 255 U.S. at 86.

The Court defined the question before it to be whether the statutory language cited above

> "constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." 255 U.S. at 89.

The Court held that the statute was clearly unconstitutional. The Court adopted the opinion of the lower court that:

> "[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." 255 U.S. at 89.

See, Giacco v. Pennsylvania, 382 U.S. 399 (1966).

This Court's recent decision in Calautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675 (1979), is illustrative of the defects present in §2915.09(A)(2). In Colautti, a section of the Pennsylvania Abortion Control Act imposed a penal sanction upon any person who performed an abortion and who failed to make a determination on whether a fetus was "viable." This Court held that the section was unconstitutionally vague. The Court also noted that the ambiguity of the statute was "aggravated by the absence of a scienter requirement with respect to the finding of viability." 439 U.S. at ___, 99 S.Ct. at 683. The Court also noted that the statute was fatally vague because there was doubt as to whether the standard was "purely subjective" or "mixed subjective and objective."

The instant statute also imposes criminal liability without a scienter requirement. Further, the vagueness of §2915.09(A)(2) is

the same as that found fatal to the statute in Calautti. Here, the standard of "customary and reasonable" might well be purely subjective, or mixed subjective and objective. In short, an ordinary person is given no notice of the standards for fixing guilt. Further, the statute leaves a judge and jury free to decide, without any legally fixed standards, what is prohibited and what is not.

Moreover, identical conduct prohibited by §2915.09(A)(2) is also prohibited by the general gambling statute, §2915.02, classified as a misdemeanor. However, because of the vagueness of §2915.09(A)(2), a third degree felony, a prosecutor can exercise unrestrained discretion to charge either a felony or a misdemeanor for identical conduct.

For all of the foregoing reasons §2915.09(A)(2) clearly violates the Fourteenth Amendment. Because the courts below failed to strike down this obviously constitutionally defective criminal statute, persons are threatened with prosecution, are prosecuted

and are convicted under a statute which violates basic due process rights protected by the Fourteenth Amendment. This Court should accept review of this question and in ruling this statute to be unconstitutional, provide additional guidance to the courts and legislatures.

CONCLUSION

This petition presents questions important to the protection of constitutional rights of every citizen. Moreover, review by this Court of the questions presented herein will provide needed clarification and guidance to the daily functioning of the criminal justice system.

Therefore, for all reasons set forth in this petition, petitioners Joseph Merlo, Raymond Parks and Harry Blackford respectfully urge this Court to grant the writ of certiorari and accept this case for review. Upon review, this Court should reverse

petitioners' convictions.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 1 1980
MICHAEL RODAK, JR., CLERK

80-460

CASE NO. _____

IN THE

Supreme Court of the United States

October Term, 1980

JOSEPH FRANCIS MERLO,
RAYMOND PARKS,
HARRY BLACKFORD,

Petitioners,

—v—

STATE OF OHIO,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OHIO

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STATE OF OHIO)		IN THE COURT OF APPEALS
) SS:		NINTH JUDICIAL DISTRICT
SUMMIT COUNTY)		
STATE OF OHIO	)	C.A. NO. 9244
	)	
Plaintiff-Appellee	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE
v.	)	COMMON PLEAS COURT
	)	SUMMIT COUNTY, OHIO
RAYMOND J. PARKS	)	CASE NO. 78 6 0663(E)
	)	
Defendant-Appellant	)	
STATE OF OHIO	)	C.A. NO. 9245
	)	
Plaintiff-Appellee	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE
v.	)	COMMON PLEAS COURT
	)	SUMMIT COUNTY, OHIO
CECILIA B. PARKS	)	CASE NO. 78 6 0663(F)
	)	
Defendant-Appellant	)	
STATE OF OHIO	)	C.A. NO. 9250
	)	
Plaintiff-Appellee	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE
v.	)	COMMON PLEAS COURT
	)	SUMMIT COUNTY, OHIO
HARRY S. BLACKFORD, aka HARRY WILSON	)	CASE NO. 78 6 0663(G)
	)	
Defendant-Appellant	)	

STATE OF OHIO	)	C.A. NO. 9251
	)	
Plaintiff-Appellee	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE
v.	)	COMMON PLEAS COURT
	)	SUMMIT COUNTY, OHIO
SANDRA MERLO BRUNTON	)	CASE NO. 78 6 0663(D)
	)	
Defendant-Appellant	)	

STATE OF OHIO	)	C.A. NO. 9252
	)	
Plaintiff-Appellee	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE
v.	)	COMMON PLEAS COURT
	)	SUMMIT COUNTY, OHIO
NANCY KUNGLE MERLO	)	CASE NO. 78 6 0663(B)
	)	
Defendant-Appellant	)	

STATE OF OHIO	)	C.A. NO. 9253
	)	
Plaintiff-Appellee	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE
v.	)	COMMON PLEAS COURT
	)	SUMMIT COUNTY, OHIO
JOSEPH FRANCIS MERLO	)	CASE NO. 78 6 0663(A)
	)	
Defendant-Appellant	)	

DECISION AND JOURNAL ENTRY

Dated: December 19, 1979

These causes were heard October 30, 1979, upon the record in the trial court, including the transcript of proceedings, and the briefs. They were argued by counsel for the parties

and submitted to the court. We have reviewed each assignment of error and make the following disposition:

MAHONEY, J.

FACTS

Raymond Parks, Cecilia Parks, Harry Blackford, Sandra Brunton, Nancy Merlo, Joseph Francis Merlo, Gerald L. Hall, Bruce Miller, three business proprietors, and three alleged corporations were jointly indicted on four counts.

The first count was engaging in organized crime in violation of R.C. 2923.04(A)(5). The second count was illegally conducting a bingo game in violation of R.C. 2915.09(A)(2). The third count was grand theft in violation of R.C. 2913.02(A)(2) and (A)(3). The fourth count was gambling in facilitating a game of chance conducted for profit in violation of R.C. 2915.02(A)(2).

Gerald L. Hall and Bruce Miller were granted severance of their trials and elected

to be tried by the court. Hall was acquitted. Miller was acquitted of Count II, but was found guilty of counts one, three and four.

Defendants, Ray and Cecilia Parks, Harry Blackford, Sandra Brunton, Joseph Francis and Nancy Merlo, plea bargained with the state. The bargains set forth in the transcript of proceedings, indicate Joseph F. Merlo pled no contest to all four counts: Sandra Brunton, Cecilia Parks and Nancy Merlo pled no contest to count four, the misdemeanor gambling. Ray Parks and Harry Blackford entered pleas of no contest to counts two, three and four. Nolle prosequi motions by the state were granted on all the remaining counts. The trial court entered findings of guilty and sentenced all six defendants.

All six defendants filed a joint appeal with a consolidated brief, containing 37 individual assignments of error which we combine and address under the six arguments set forth in the consolidated brief.

ARGUMENT I

"The trial court erred in denying appellant Joseph Merlo's motion for judgment of acquittal on all counts in the indictment."

On Monday, March 12, 1979, before impaneling the jury, the prosecutor advised the court that the state and the defendants had been negotiating a plea bargain but lacked agreement.

"***upon the underlying factual basis for the no contest pleas, allow all Counsel and the State to feel that the appeal rights have been adequately preserved in that entire matter.***."

The trial was continued until Wednesday, March 14. At which time, the prosecutor advised the court a plea bargain had been reached under Crim. R. 11(F). Essentially, the pleas and nolles were as set forth above with certain recommended sentences by the prosecutor and a promise that no further indictments would be sought.

Then the prosecutor said:

"***.

"And Defendants--I would state to the Court--do intend to have--indicated the desire that they do intend to perfect their appeals after the findings--if and when the Court makes findings of guilty and sentences with regards to these no contest pleas. And other matters, I believe, are best left for after the statements, in fact, and if the Court inquiries of the Defendants as to their rights in connection with the plea."

"***."

The trial judge then addressed each defendant personally. With deliberate, exacting care, he made inquiries concerning all matters set forth in Crim. R. 11(C) and received appropriate responses.

During the Crim. R. 11(C) inquiry of Joseph Merlo, the trial judge asked if Merlo understood that:

"***if you enter a plea of no contest, as indicated that you anticipate doing in this Court, then you are not admitting the charges, but you are consenting to this Court making a finding from the Indictment and from the stipulation of facts which will be made to this Court?"

"***."

Merlo answered that he understood.

The trial judge also asked Merlo:

> "***do you understand that when you enter such a plea you then consent to the Court making a finding and proceeding to sentence, if the Court finds you guilty of those counts?"
>
> "***."

Again, Merlo answered that he understood.

The trial judge also inquired of Merlo:

> "***.
>
> "And do you understand the State is required to prove each and every one of these counts and each and every element thereof beyond a reasonable doubt when you enter a plea of no contest or guilty--or no contest--or no contest, as in this case, you relieve them of that burden, you understand that?"
>
> "***."

Again, Merlo responded that he understood.

Additionally, the court asked if Merlo understood the consequences of the no contest plea and he responded affirmatively.

Defense counsel then moved and renewed motions for dismissal of all counts for various reasons. The prosecutor then said:

"***.

"The State's case with regards to all six Defendants, if we went to trial, would consist of the following items:"

"***."

The prosecutor then stated the evidence would be all of the testimony in the trial of Bruce Miller and Gary Hall. A transcript of proceedings was produced for the court's use. However, the trial judge who was the same judge who had previously heard the Miller and Hall case as the trier of fact, asked if counsel all agreed that he could use his recollection rather than read the transcript. All agreed.

The prosecutor then continued by saying he would have produced several more witnesses. He proceeded to briefly recite the proposed testimony of each, including various searches, surveillances and various exhibits. The only exception to the Miller-Hall transcript of proceedings would be to exclude the testimony of a telephone conversation between state's

witness Attorney Bernard Roetzel and the defendant, Attorney Bruce Miller, on pages 158 and 159 which referred to Joseph E. Merlo's participation in the bingo operation.

Merlo's attorney then requested that, prior to entering a finding, the court enter a judgment of acquittal since none of the charges had been proven by the prosecutor's recital of facts. The court then overruled the motion as to all defendants. He called the defendant, Joseph F. Merlo, forward and said:

> "***.
>
> "Mr. Merlo, you have entered a plea of no contest to all counts of this Indictment. First of all, engaging in organized crime, conducting an illegal bingo game and grand theft and gambling. The Court has heard the stipulation of facts, recitation of facts, and which includes the proceedings that were held in the Bruce Miller trial which this Court presided over. Based upon those things, this Court makes a finding of guilty as to each and every one of the counts which you entered a plea of no contest."
>
> "***."

The Court thereupon imposed the recommended sentence. Crim. R. 11(B)(2) and (3) provides:

> "(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:
>
> "(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.
>
> "(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court shall, except as provided in subsections (C)(3) and (4), proceed with sentencing under Rule 32."

Crim. R. 11(C)(2)(b) says:

> "(C) Pleas of guilty and no contest in felony cases.
>
> "(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:
>
> "(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of

the plea may proceed with judgment and sentence."

Crim. R. 11(C)(4) states:

"(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest."

Crim. R. 12(H) provides:

"(H) Effect of plea of no contest. The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence."

Merlo argues that the state fails in its burden of proving each and every element of the offense and that this reviewing court should apply the standards of Jackson v. Virginia, ___U.S.___, 99 S.Ct. 2781 (1979); In re Winship, 397 U.S. 358 (1970), and State v. Nutter, 22 Ohio St. 2d 116 (1970) and find the evidence insufficient for conviction. Merlo further argues that the little evidence against him is all circumstantial and readily reconcilable with his theory of innocent behavior. State v. Sorgee, 54 Ohio St. 2d 464 (1978) and State v. Kulig, 37 Ohio St. 2d 157

(1974). Thus, Merlo asks us to weigh the evidence against him on his no contest plea. We cannot, for that is not the function of a no contest plea.

A plea of no contest, accepted by the court, is an admission of the truth of the facts alleged in the indictment (Crim. R. 11 (B)(2)). Defendant cannot then ask the court to weigh the evidence against him and determine his guilt. The court can only weigh evidence as to its sufficiency after a plea of not guilty and the evidence on either side is closed. To do so would be to say the defendant disputes the truth of his own admission. The motion for a judgment of acquittal is not a pre-trial motion. Therefore, it cannot be appealed under Crim. R. 12(H).

The no contest plea is not intended to precede a mini-trial or some sort of contrived summary proceeding to pass questions of law or facts on to the courts of appeals. That can only be done by stipulated facts after a plea of not guilty and a finding of guilty by the trial judge.

The no contest plea under Crim. R. 11 does not contemplate or require any further finding by the trial court, not even a ritualistic finding of guilty. The court is empowered to proceed promptly to sentencing (Crim. R. 11(B)(3)). The court is not required to take any testimony. Any testimony that is received or any statements made can only have a bearing on the question of sentencing.

If, by chance, the trial court accepts testimony or statements and determines that the underlying factual basis may not be sufficient to establish one of the essential elements of the charge, then the court must refuse to accept the plea of no contest and enter a plea of not guilty and put the state to its burden of proof. The trial judge has no authority under a no contest plea to reduce or change the charge to a lesser included offense or to one of a lesser degree. He likewise has no authority to enter findings

of not guilty.[1]

Merlo was properly examined under Crim. R. 11 by the trial court and indicated he knew the consequences of a no contest plea and understood he was relinquishing his rights, particularly the right to require the state to prove his guilt beyond a reasonable doubt. (TOP V p. 40).

ARGUMENT II (all defendants)

"The trial court erred in overruling appellants' motions to suppress evidence seized in violation of the Courth and Fourteenth Amendments of the United States Constitution and Article I, §14 of the Ohio Constitution."

"(A) Suppression was required because the warrants were issued without probable cause.

"(B) Suppression was required because the warrants were overbroad and vague.

---

[1] R.C. 2937.07 which authorized findings of guilty or not guilty after an explanation of circumstances following a no contest plea in misdemeanor cases, has been impliedly superceded by Crim. R. 11.

"(C) Suppression was required because the seizures were general and exploratory, beyond the scope of the warrant."

Defendants attack the search warrant on the broad grounds that it recites a great deal of innocent behavior and draws conclusions predicated on opinions and estimates of the deputy sheriffs. They further argue that there was no basis for an independent magistrate to reach a decision. We disagree.

The purpose of an affidavit and supporting testimony is to show that probable cause exists to believe that a particular crime has been or is being committed and that evidence of the crime can be found at specifically designated locations.

The law enforcement officer, like any professional, hones his skills by expertise and practice. As those skills develop, a law enforcement officer can become an expert in his particular field of enforcement. He cannot go to a formal school to become knowledgeable, and achieve expertise in drug abuse, burglary,

auto theft, missing persons, gambling, and extortion, etc. When he becomes knowledgeable and achieves that expertise, his opinions concerning same should be considered in affidavits for search warrants. The issuing magistrate must distinguish between pure conclusory statements and opinions based upon an expert's knowledge and expertise. In this case, Detective Maurer's experience and expertise are set forth under paragraph one of the factual portion of the affidavit. The opinions he expresses are based upon personal observation and the reports of other officers. He examined the formal required reports filed with the Attorney General's office. Surveillance was maintained on each of the defendants and their automobiles. From these observations, the inference is apparent that there was probable cause to believe that defendants were all involved in the continuing operation of the bingo games.

The observation of the reports and investigations of the Attorney General's office reveal that the bingo laws were being violated because the charities were not receiving the gross receipts after the allowable statutory expenses.

We, therefore, conclude that there was a factual basis upon which the issuing magistrate could find the necessary probable cause.

The warrants here read:

"***.

"Supplies, books and records and proceeds of illegal games and gambling paraphernalia,

"which is evidence of the commission of a criminal offense, or fruits of that crime, to-wit: Engaging in Organized Crime and Conducting an Illegal Bingo Game."

"***."

We further hold that the warrants were not overbroad and vague and meets the tests of Resen v. Maryland, 427 U.S. 463 (1976); Marron v. United States, 275 U.S. 192 (1927); Spinelli v. United States, 382 F. 2d 871 (8th

1967); and Nuckols v. United States, 99 F. 2d 353 (D.C. Cir. 1938).

We further find that the seizures were not general and exploratory beyond the scope of the warrants. There were some personal items seized and returned. Nothing beyond the scope of the warrant was used in evidence. We hold that the seizure of some personal items does not invalidate the seizure of the other items. No evidence was taken on the motion to suppress evidence as to what was seized, where it was seized, and if it had some evidentiary value. The burden in attacking the warrants is upon the defendant-appellants. Maryland Penitentiary v. Hayden, 387 U.S. 294, 307 (1967).

ARGUMENT III (all defendants)

"The trial court erred by refusing to grant appellants an evidentiary hearing on the issue of material misrepresentations in the search warrant affidavit in violation of appellants' fourth and fourteenth amendment rights."

Defendants rely on Franks v. Delaware, 438 U.S. 154 (1978). They support their claim by two affidavits of George W. Palda, counsel of record. These affidavits are not based upon any facts within the personal knowledge of the affiant. The averments are merely hearsay statements of matters the affiant says he learned from the defendants and a review of the testimony in State v. Miller, Summit No. 9201 (9th Dist. Ct. App., December 5, 1979). Based upon these, Palda concludes that certain statements in the affidavit for the search warrant are false. Palda's affidavit volunteers his conclusion that there is no inconsistency shown in the attendance figures.

We hold these affidavits were procedurally insufficient to require an evidentiary hearing. They are void of any offer of proof of deliberate falsehood or of reckless disregard for the truth. Taken in their best light, they show some inconsistencies in the surveillance teams testimony concerning the containers in which the money was allegedly transported.

We draw different conclusions than Mr. Palda from the attendance figures and gross receipts set forth in Detective Maurer's affidavit for the search warrants. There is no proof that the inconsistencies in testimony were deliberate or made in reckless disregard for the truth.

ARGUMENT IV (J. F. Merlo)

"The trial court erred in overruling appellant Joseph Merlo's motion to dismiss Count I of the indictment, engaging in organized crime, because the statute is unconstitutional under the United States and Ohio Constitutions.

"(A) R.C. 2923.04 is unconstitutionally vague and overbroad.

"(B) R.C. 2923.04 violates due process because it fails to require proof of guilty knowledge.

"(C) R.C. 2923.04 violates the prohibitions of the United States Constitution and Ohio Constitution against cruel and unusual punishment."

We have previously held R.C. 2923.04 (engaging in organized crime) is unconstitutional. See, State v. Powell, Summit No. 8878 (9th Dist. Ct. App., November 28, 1979) and

State v. Miller, supra. Those opinions address all of the attacks raised by the defendants, except that R.C. 2923.04 imposes cruel and unusual punishment. We find such an argument is without merit.

ARGUMENT V
(J. F. Merlo, Ray Parks, Harry Blackford)

"The trial court erred by overruling appellants' motions to dismiss count II of the indictment because the underlying statute, R.C. 2915.09 (A)(2) is unconstitutionally vague."

The defendants assert that the phrase "providing that the amount of the receipts so spent is not more than is customary and reasonable for a similar purchase, lease, etc.***" is vague. They argue that the "customary and reasonable" and "similar purchases" are not defined in the statute. Thus, they say they are without any guidelines as to what conduct is proscribed.

The phrases in question are words of common usage with generally accepted common meanings easily ascertainable by reference to a standard dictionary. The phrases put the

burden on the state to show what were customary and reasonable expenditures and that they were exceeded. The trier of fact can readily make such a determination by applying the ordinary accepted meaning of the words.

It is ludicrous to argue vagueness concerning the reasonableness of expenditures when the very transcript of proceedings in the State v. Miller trial which these defendants had asked the trial court to review shows that they violated several other provisions of the statute, i.e. They (1) did not give the charities the net receipts in excess of expenses, (2) charged on rentals of equipment, cards and prizes to make a profit for themselves for running the game, (3) paid persons to work as bingo game operators, checkers, etc., (4) paid their attorney out of the proceeds, and (5) did not lease the equipment from a licensed charitable organization.

Thus, even if we severed the phrases complained of, the statute would still be viable and the defendants in violation thereof.

ARGUMENT VI
(J. F. Merlo, Ray Parks,
Harry Blackford)

"The trial court erred by failing to dismiss counts II and III of the indictment in violation of appellants' constitutional rights to adequate notice of the crimes charged."

Defendants' brief clearly sets forth the applicable case law. However, we fail to see where the language of the indictment does not set forth all of the essential elements of each crime charged with clarity. The defendants fail to point out the missing elements or lack of clarity.

The alleged vagueness of the dates, i.e. (September 1977 to June 9, 1978) emphasizes that we are dealing with continuous on-going objectives of a criminal enterprise. That limits the number of convictions possible to only one under each statute even though there were various amounts withheld wrongfully each night the illegal gambling game was operated.

Crim. R. 7 permits the alternative indictment in counts II and III. No constitutional

impediment exists when counts are drawn in the alternative and a bill of particulars is furnished. State v. Fowler, 174 Ohio St. 362 (1963).

The last objection as to the failure of other indictments to specify the name of the owner of the money included in the theft was clarified by the bill of particulars which designated the various charities as the owners.

PLAIN ERROR - RAISED SUA SPONTE

We held R.C. 2923.04 to be constitutional and to be a conspiracy type statute in State v. Powell, supra, and State v. Miller, supra. Both cases were decided after the court accepted the pleas in this case. Both of those cases applied the provisions of R.C. 2923.01(F), (G) and (K) to R.C. 2903.04. This means that we must find it was plain error for the trial court to accept Joseph Merlo's no contest plea to R.C. 2923.04 at the same time he was accepting the no contest pleas to two of the specific crimes involved with the

overall conspiratorial required under the organized crime statute.

SUMMARY

Accordingly, we dismiss count I of the indictment as to Joseph Francis Merlo, but we affirm his convictions and sentence as to counts II, III and IV.

We affirm the convictions of Nancy Merlo, Cecilia Parks and Sandra Brunton as to Count IV of the indictment. We affirm the conviction of Ray Parks and Harry Blackford as to count II, III and IV.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Summit County Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of

judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellants.

Exceptions.

/S/_____
Presiding Judge
- for the Court -

BELL. P. J.
CONCUR

VICTOR, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

STEPHAN M. GABALAC, Prosecuting Attorney, City-County Safety Bldg., Akron, OH 44308 for Plaintiff-Appellee.

BRUCE N. METZ, Attorney at Law, Suite 411, Quaker Square, 120 E. Mill St., Akron, OH 44308 for Defendant Appellant.

HAROLD K. STUBBS and THOMAS S. E. BROWN, Attorneys at Law, 1908 I Cascade Plaza, Akron, OH 44308 for Defendant Appellant.

BERNARD A. BERKMAN and GEORGE PALDA, Attorneys at Law, 2121 The Illuminating Bldg. 55 Public Square, Cleveland, OH 44113 for Defendant-Appellant.

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO	)	CASE NO. 78-6-0663-A thru N
PLAINTIFF	)	
--v--	)	O R D E R
JOSEPH FRANCIS MERLO, ET AL	)	
DEFENDANTS	)	

This matter came on for hearing on the 21st day of November, 1978, upon Motions filed by the Defendants.

The Court finds that Judge William Baird had considered and ruled on a number of motions filed by the Defendants prior to his disqualification from this case. All such Motions are considered refiled for determination by the Court without the necessity of counsel formally refiling such motions.

This Court thereupon heard arguments of counsel on the Motion to Dismiss filed by the defendants, arguments upon the Motion to Sever, and the Motion to Suppress statements filed by the Defendant, Bruce W. Miller.

All motions requiring Evidentiary Hearing are continued to a later date.

As to the Motions to Dismiss the Indictment, the Court hereby overrules such motions.

As to the Motion of the Defendant, Bruce W. Miller, to suppress certain statements made by him to or in the presence of Attorney Roetzel, the Court hereby overruled such motion.

As to the Motion to Sever filed by Defendant, Bruce W. Miller, the Court finds such Defendant has waived Jury Trial and will, therefore, rule upon such motion pending determination of Waiver of Jury by other defendants prior to the commencement of the trial of the Defendant Miller on December 4, 1978.

Dated at Ravenna, Ohio, this 30th day of November, 1978.

/S/_____
COMMON PLEAS JUDGE

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO	)	CASE NO. 78-06-0663
	)	
PLAINTIFF	)	
	)	
--vs--	)	RULING ON DEFENDANTS' MOTIONS
	)	
JOSEPH FRANCIS MERLO, ET AL	)	
	)	
DEFENDANTS	)	

These matters came before the Court upon the various motions which have been made by the various Defendants in this action. Since various Defendants have joined in each others' motions, the Court will rule on all motions as to all Defendants as if all Defendants have joined in all motions.

Defendants' motion for a stay of proceedings pending appellate determination of State vs. Carnine, is "overruled" and the Court reaffirms its prior ruling that Ohio Revised Code Section 2923.04 (Organized Crime) is constitutional as applied in this case.

Defendants' motion to dismiss Count No. 4 of the Indictment (First Degree Misdemeanor) as not having been timely filed is "overruled"

on the grounds that Count No. 4 is part of a common indictment encompassing felonies arising out of the same alleged conduct and that said felonies control the time limitations regarding the prosecution of all four counts in the Indictment.

Defendants' motion to quash the search warrants because they were not returned within three days after issuance is "overruled."

Defendants' objections to the Bill of Particulars are "overruled."

Defendants' motion to suppress tape recorded conversations between Attorney Nick Roetzel and Attorney Bruce Miller is "overruled."

Defendants' Motion for an Evidentiary Hearing is "overruled" as the Court is unable to find a substantial showing of falsehood by the Affiant necessary to impair the validity of the search warrants. The Court further finds that the requisite probable cause was established by the Affidavit to justify the issuance of the search warrants.

The Court finds that in selected instances the searches conducted under the warrants were overbroad and that certain items seized must be suppressed from being entered into evidence. Those items which are to be suppressed are listed below by making reference to the specific item numbers on the Inventory Sheets attached to each particular search warrant. Where only the item number has been listed all the items denoted by that number are hereby ordered suppressed. Where specific items are listed following the item number only those items specifically listed are to be suppressed and all other items denoted by the item number are deemed admissable. All other items under each warrant that are not specifically denoted either by item number or by description are deemed admissable as to all Defendants.

I.

LAKEMORE PLAZA BINGO HALL
1900 Canton Road
Lakemore, Ohio

All items seized are admissable as to all Defendants

II.

TWO BUILDINGS AT
767 North Howard Street
Akron, Ohio

All items seized are admissable
as to all Defendants.

III.

1972 BUICK AUTOMOBILE
Ohio Registration A-9381-G
Owner: Gerald Hall

All items seized are admissable
as to all Defendants.

IV.

APARTMENT NO. 5, EXECUTIVE
TOWNHOUSE APARTMENTS
338 East Portage Trail
Cuyahoga Falls, Ohio

All items seized are admissable
as to all Defendants.

V.

TWO STORY HOUSE AT
877 Chalker Avenue
Akron, Ohio

Residence of: Raymond and
Cecilia Parks

THE FOLLOWING ITEMS ARE ORDERED SUPPRESSED:

Item No. 5	Item No. 20
Item No. 6	Item No. 21
Item No. 7	Item No. 22
Item No. 8	Item No. 33
Item No. 10	Item No. 35

Item No. 11	Item No. 38 - Keys & Jewelry only
Item No. 12	Item No. 39
Item No. 14	Item No. 40
Item No. 15	Item No. 42
Item No. 16	Item No. 44
Item No. 17	Item No. 45
Item No. 18	Item No. 46
Item No. 19	Item No. 47

All other items seized under the warrant are deemed admissable.

VI.

1977 CORDOBA COUPE
Ohio Registration B-1564-R
Owner: Harry Blackford

The following items are ordered suppressed:

Item No. 14
Item No. 16

All other items seized under the warrant are deemed admissable.

VII.

TWO STORY RESIDENCE AT
5982 Kungle Road
Franklin Township
Clinton, Ohio
Residence of: Harry Blackford

The following items are ordered suppressed:

Item No. 6 - Phone Books only
Item No. 11

All other items seized under the warrant are deemed admissable.

VIII.

1978 JAGUAR COUPE
Ohio Registration No. 313068
Owner: Nancy Kungle (Merlo)

The following items are ordered suppressed:

Item No. 2 - Pictures and change only

Item No. 3 - Garage Door Opener Only

All other items seized under the warrant are deemed admissable.

IX.

1974 OLDSMOBILE
V.I.N. Number 3V39T4E118678
Owner: Nancy Kunkel

All items seized are admissable as to all Defendants.

X.

APARTMENT 2-A at
1342 Weathervane Lane
Cedarwood Village
Akron, Ohio
Residence of: Joseph and Nancy Merlo

The following items are ordered suppressed:

Item No. 2
Item No. 4
Item No. 6
Item No. 7

All other items seized under the warrant are deemed admissable.

XI.

1974 OLDSMOBILE
Ohio Registration No. 292976
Owner: Sandra Brunton

All items seized under the warrant are admissable as to all Defendants.

XII.

TWO STORY HOUSE AT
2345 Iota Avenue
Cuyahoga Falls, Ohio
Residence of: Sandra Brunton

The following Items are ordered suppressed:

Item No. 1
Item No. 18 - Cassette Tapes Only
Item No. 19

All other items seized under the warrant are deemed admissable.

Dated at Ravenna, Ohio, this 9th day of February, 1979.

/S/_____
JOSEPH R. KAINRAD

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	)	1980 TERM
	)	
City of Columbus.	) To wit:	June 18, 1980

State of Ohio,	)	No. 80-248
	)	
Appellee,	)	
	)	APPEAL FROM THE
vs.	)	COURT OF APPEALS
	)	
Raymond Parks et al.,	)	
	)	for SUMMIT County
Appellant.	)	

This cause, here on appeal as of right from the Court of Appeals for SUMMIT County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional questions exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for SUMMIT County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from

the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____ 19_____.

_____Clerk

_____Deputy

SUPREME COURT OF THE UNITED STATES

No. A-137

JOSEPH FRANCIS MERLO, RAYMOND PARKS AND HARRY BLACKFORD,

Petitioners,

v.

OHIO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 16, 1980.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 8th

day of August, 1980.

CONSTITUTION OF THE UNITED STATES

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§2913.02 Theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat.

(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than one hundred fifty dollars, violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one hundred fifty dollars or more, or if the property stolen is any of the property listed in section

2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, then violation of this section is grand theft, a felony of the fourth degree.

§2915.01 Definitions. (Pre 12-15-77)

As used in sections 2915.01 to 2915.12 of the Revised Code:

(A) "Bookmaking" means the business of receiving or paying off bets.

(B) "Bet" means the hazarding of anything of value upon the result of an event, undertaking, or contingency, but does not include a bona fide business risk.

(C) "Scheme of chance" means a lottery, numbers game, pool, or other scheme in which a participant gives a valuable consideration for a chance to win a prize.

(D) "Game of chance" means poker, craps, roulette, a slot machine, a punch board, or other game in which a player gives anything of value in the hope of gain, the outcome of

which is determined largely or wholly by chance.

(E) "Scheme or game of chance conducted for profit" means any scheme or game of chance designed to produce income for the person who conducts or operates the scheme or game of chance, but does not include a charitable bingo game.

(F) "Gambling device" means:

(1) A book, totalizer, or other equipment for recording bets;

(2) A ticket, token, or other device representing a chance, share, or interest of chance, except a charitable bingo game, or evidencing a bet;

(3) A deck of cards, dice, gaming table, roulette wheel, slot machine, punch board, or other apparatus designed for use in connection with a game of chance;

(4) Any equipment, device, apparatus, or paraphernalia specially designed for gambling purposes.

(G) "Gambling offense" means any of the following:

(1) A violation of section 2915.02, 2915.03, 2915.04, 2915.05, 2915.06, 2915.07, 2915.08, 2915.09, 2915.10, or 2915.11 of the Revised Code;

(2) A violation of an existing or former municipal ordinance or law of this or any other state of the United States substantially equivalent to any section listed in division (G)(1) of this section;

(3) An offense under an existing or former municipal ordinance or law of this or any other state or the United States, of which gambling is an element;

(4) A conspiracy or attempt to commit, or complicity in committing any offense under division (G)(1), (2), or (3) of this section.

(H) "Charitable organization" means any tax exempt religious, educational, veteran's, fraternal, service, nonprofit medical, volunteer rescue service, volunteer

firemen's, or senior citizen's organization. An organization is tax exempt if it is exempt from federal taxation under subsection 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), or 501(c)(19) of the Internal Revenue Code. To qualify as a charitable organization, an organization, except a volunteer rescue service or volunteer firemen's organization, shall have been in continuous existence as such in this state for a period of two years immediately preceding the making of an application for a bingo license under section 2915.08 of the Revised Code.

(I) "Religious organization" means any church, body of communicants, or group that is not organized or operated for profit, that gathers in common membership for regular worship and religious observances.

(J) "Educational organization" means any organization within this state that is not organized for profit, the primary purpose of which is to educate and develop the capabilities of individuals through instruction,

and that operates or contributes to the support of a school, academy, college, or university.

(K) "Veteran's organization" means any veteran's organization or association that is incorporated by an act of the United States congress or any auxiliary unit of that veteran's organization or association.

(L) "Volunteer firemen's organization" means any organization of volunteer firemen, as defined in section 146.01 of the Revised Code, that is organized and operated exclusively to provide financial support for a volunteer fire department or a volunteer fire company.

(M) "Fraternal organization" means any society, order, or association within this state, except a college or high school fraternity, that is not organized for profit, that is a branch, lodge, or chapter of a national or state organization, that exists exclusively for the common business or brotherhood of its members, and that has

been in continuous existence in this state for a period of five years.

(N) "Volunteer rescue service organization" means any organization of volunteers organized to perform emergency medical service as defined in division (E) of section 4731.82 of the Revised Code.

(O) "Service organization" means any organization, not organized for profit, that is organized and operated exclusively to provide, or to contribute to the support of organizations or institutions organized and operated exclusively to provide, medical and therapeutic services for persons who are crippled, born with birth defects, or have any other mental or physical defect or to protect, or to contribute to the support of organizations or institutions organized and operated exclusively to protect, animals from inhumane treatment.

(P) "Nonprofit medical organization" means any organization, not organized for profit, that is organized and operated

exclusively to provide, or to contribute to the support of organizations or institutions organized and operated exclusively to provide, hospital, medical, research, or therapeutic services for the public.

(Q) "Senior citizen's organization" means any private organization, not organized for profit, that is organized and operated exclusively to provide recreational or social services for persons who are fifty-five years of age or older and that is described and qualified under subsection 501(c)(3) of the Internal Revenue Code.

(R) "Charitable bingo game" means any bingo game that is conducted by a charitable organization that has obtained a bingo license pursuant to section 2915.08 of the Revised Code and the proceeds of which are used for a charitable purpose.

(S) "Bingo" means:

(1) A game with all of the following characteristics:

(a) The participants use bingo cards

that are divided into twenty-five spaces arranged in five horizontal and five vertical rows of spaces, with each space, except the central space, being designated by a combination of a letter and a number and with the central space being designated as a free space;

(b) The participants cover the spaces on the bingo cards that correspond to combinations of letters and numbers that are announced by a bingo game operator;

(c) A bingo game operator announces combinations of letters and numbers that appear on objects that a bingo game operator selects by chance, either manually or mechanically, from a receptacle that contains seventy-five objects at the beginning of each game, each object marked by a different combination of a letter and a number that corresponds to one of the seventy-five possible combinations of a letter and a number that can appear on the bingo cards;

(d) The winner of the bingo game includes any participant who properly announces during the interval between the announcements of letters and numbers as described in division (S)(1)(c) of this section, that a predetermined and preannounced pattern of spaces has been covered on a bingo card being used by the participant.

(2) Any scheme or game other than a game as defined in division (S)(1) of this section with the following characteristics:

(a) The participants use cards, sheets, or other devices that are divided into spaces arranged in horizontal, vertical, or diagonal rows of spaces, with each space, except free spaces, being designated by a single letter, number, or symbol; by a combination of a letter and a number, a letter and a symbol, or a number and symbol; or by any combination of letters, numbers, and symbols, with some or none of the spaces being designated as a free, complimentary, or similar space;

(b) The participants cover the spaces

on the cards, sheets, or devices that correspond to letters, numbers, symbols, or combinations of such that are announced by a bingo game operator or otherwise transmitted to the participants;

(c) A bingo game operator announces, or otherwise transmits to the participants, letters, numbers, symbols, or any combination of such as set forth in division (S)(2) of this section that appear on objects that a bingo game operator selects by chance that correspond to one of the possible letters, numbers, symbols, or combinations of such that can appear on the bingo cards, sheets, or devices;

(d) The winner of the bingo game is any participant who properly announces that a predetermined and preannounced pattern of spaces has been covered on a card, sheet, or device being used by the participant.

(T) "Conduct" means to back, promote, organize, manage, carry on, or prepare for the operation of a scheme or game of chance

but does not include any act performed by a bingo game operator.

(U) "Bingo game operator" means any person, except security personnel, who performs work or labor at the site of a bingo game including, but not limited to, collecting money from participants, handing out bingo cards or objects to cover spaces on the bingo cards, selecting from a receptacle the objects that contain the combination of letters and numbers that appear on the bingo cards, calling out the combinations of letters and numbers, distributing prizes to the winner of the bingo game, and serving refreshments.

(V) "Participant" means any person who plays bingo by covering the spaces on a bingo card that correspond to combinations of letters and numbers that are announced by a bingo game operator.

(W) "Bingo session" means a period, not to exceed five continuous hours, during which a person conducts one or more bingo games.

(X) "Gross receipts" means all money or assets, including admission fees, that a person receives from a bingo session that the person conducts without the deduction of any amounts for prizes paid out during the session or for the expenses of conducting the bingo session.

(Y) "Security personnel" includes any person who is a sheriff, deputy sheriff, marshal, deputy marshal, township constable, or member of an organized police department of a municipal corporation or has successfully completed a peace officer's training course pursuant to sections 109.71 to 109.79 of the Revised Code and who is hired to provide security for the premises on which a bingo game is conducted.

(Z) "To use gross receipts for a charitable purpose" means that the proceeds of the bingo game are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal

Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(c)(3) of the Internal Revenue Code that the proceeds of the bingo game are used by, or given, donated, or otherwise transferred to a veteran's organization, as defined in division (K) of this section, that is a post, chapter, or organization of war veterans, or an auxiliary unit or society of, or a trust or foundation for, any such post, chapter, or organization organized in the United States or any of its possession, at least seventy-five per cent of the members of which are war veterans and substantially all of the other members of which are individuals who are veterans (but not war veterans) or are cadets, or are spouses, widdows or widowers of war veterans, or such individuals, provided that no part of the net earnings of such post or organization inures to the benefit of any private shareholder or individual, and further provided that the bingo game proceeds are used by the

post or organization for the charitable purposes set forth in division (B)(12) of section 5739.02 of the Revised Code, awarding scholarships to or for attendance at an institution mentioned in division (B)(12) of section 5739.02 of the Revised Code, donated to a governmental agency, or used for nonprofit youth activities, promotion of patriotism, or disaster relief; that the proceeds of the bingo game are used by, or given, donated, or otherwise transferred to a fraternal organization that has been in continuance existence in this state for fifteen years for use exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals and contributions for such use would qualify as a deductible charitable contribution under subsection 170 of the Internal Revenue Code; or that the proceeds of the bingo game are used by a volunteer firemen's organization and are used by the organization for the purposes set forth in

division (L) of this section.

(AA) "Internal Revenue Code" means the "Internal Revenue Code of 1954," 68A Stat. 3, 26 U.S.C. 1, as now or hereafter amended.

§2915.02 Gambling.

(A) No person shall:

. . .

(2) Establish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit.

. . .

(B) ...For purposes of division (A)(2) of this section, a person facilitates a scheme or game of chance conducted for profit if he in any way knowingly aids in the conduct or operation of any such scheme or game, including without limitation playing any such scheme or game.

(C) This section does not prohibit conduct in connection with gambling expressly permitted by law; does not apply to schemes

of chance conducted by a charitable organization that is tax exempt under subsection 501(c)(3) of the Internal Revenue Code, provided that all of the money or assets received from such scheme of chance after deduction only of prizes paid out during the conduct of the scheme of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(c)(3) of the Internal Revenue Code; and does not apply to games of chance, except craps for money, roulette for money, and slot machines, that are conducted by charitable organizations that are tax exempt under subsection 501(c)(3) of the Internal Revenue Code, at the organizations' festivals, if the festivals are conducted for a period of four consecutive days or less and not more than twice a year.

(§2915.02) (Pre 12/15/77)

(D) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender has previously been convicted of any gambling offense, gambling is a felony of the fourth degree.

§2915.09 [Rules for conducting bingo.]

(A) A charitable organization that conducts a bingo game shall:

. . .

(2) Use all the gross receipts from the bingo game for paying prizes, for the charitable purposes listed in its bingo license application, for purchasing or leasing bingo cards and other equipment used in conducting the bingo game, for hiring security personnel for the bingo game, for advertising the bingo game, and for renting premises in which to conduct the bingo game.

. . .

(C) Whoever violates division (A)(2) of this section is guilty of illegally conducting a bingo game, a felony of the third

degree. Whoever violates division (A)(1), (A)(3), (A)(4), (A)(5), or (B) of this section is guilty of a minor misdemeanor. If the offender has previously been convicted of a violation of division (A)(1), (A)(3), (A)(4), (A)(5), or (B) of this section, a violation of division (A)(1), (A)(3), (A)(4), (A)(5), or (B) of this section is a misdemeanor of the first degree.

OHIO REVISED CODE

§2915.01(Post-December 15, 1977)*

(A) "Bookmaking" means the business of receiving or paying off bets.

(B) "Bet" means the hazarding of anything of value upon the result of an event, undertaking, or contingency, but does not include a bona fide business risk.

(C) "Scheme of chance" means a lottery, numbers game, pool, or other scheme in which a participant gives a valuable consideration for a chance to win a prize.

(D) "Game of chance" means poker, craps, roulette, a slot machine, a punch board, or other game in which a player gives anything of value in the hope of gain, the outcome of which is determined largely or wholly by chance.

* Amendments to the pre-December 15, 1977 Act are indicated by capitalization and, where appropriate, interlineation.

(E) "Scheme or game of chance conducted for profit" means any scheme or game of chance designed to produce income for the person who conducts or operates the scheme or game of chance, but does not include a charitable bingo game.

(F) "Gambling device" means:

(1) A book, totalizer, or other equipment for recording bets;

(2) A ticket, token, or other device representing a chance, share, or interest in a scheme of chance, except a charitable bingo game, or evidencing a bet;

(3) A deck of cards, dice, gaming table, roulette wheel, slot machine, punch board, or other apparatus designed for use in connection with a game of chance;

(4) Any equipment, device, apparatus, or paraphernalia specially designed for gambling purposes.

(G) "Gambling offense" means any of the following:

(1) A violation of section 2915.02, 2915.03, 2915.04, 2915.05, 2915.06, 2915.07, 2915.08, 2915.10, or 2915.11 of the Revised Code;

(2) A violation of an existing or former municipal ordinance or law of this or any state or the United States substantially equivalent to any section listed in division (G)(1) of this section;

(3) An offense under an existing or former municipal ordinance or law of this or any other state or the United States, of which gambling is an element;

(4) A conspiracy or attempt to commit, or complicity in committing any offense under division (G)(1), (2), or (3) of this section.

(H) "Charitable organization" means any tax exempt religious, educational, veteran's fraternal, service, nonprofit medical, volunteer rescue service, volunteer firemen's, ~~or~~ senior citizen's. YOUTH ATHLETIC, OR YOUTH ATHLETIC PARK organization.

An organization is tax exempt if ~~it~~ THE ORGANIZATION IS, AND HAS RECEIVED FROM THE INTERNAL REVENUE SERVICE A DETERMINATION LETTER THAT IS CURRENTLY IN EFFECT, STATING THAT THE ORGANIZATION is, exempt from federal INCOME taxation under SUBSECTION 501(a) AND DESCRIBED IN subsection 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), or 501(c)(19) of the Internal Revenue Code. To qualify as a charitable organization, an organization, except a volunteer rescue service or volunteer firemen's organization, shall have been in continuous existence as such in this state for a period of two years immediately preceding EITHER the making of an application for a bingo license under section 2915.08 of the Revised Code OR THE CONDUCTING OF ANY SCHEME OF CHANCE OR GAME OF CHANCE AS PROVIDED IN DIVISION (C) OF SECTION 2915.02 OF THE REVISED CODE.

(I) "Religious organization" means any church, body of communicants, or group that

is not organized or operated for profit, that gathers in common membership for regular worship and religious observances.

(J) "Educational organization" means any organization within this state that is not organized for profit, the primary purpose of which is to educate and develop the capabilities of individuals through instruction, and that operates or contributes to the support of a school, academy, college or university.

(K) "Veteran's organization" means any veteran's organization or association that is incorporated by an act of the United States congress or any auxiliary unit of that veteran's organization or association, AND ANY POST OF A NATIONAL VETERAN'S ORGANIZATION THE NATIONAL DUES PAYING MEMBERSHIP OF WHICH NUMBERS AT LEAST FIVE THOUSAND PERSONS, WHETHER OR NOT INCORPORATED BY AN ACT OF THE UNITED STATES CONGRESS, WHICH POST HAS BEEN IN CONTINUOUS EXISTENCE AS SUCH

IN THIS STATE FOR AT LEAST TWENTY YEARS AND HAS BEEN INCORPORATED AS A NONPROFIT CORPORATION FOR AT LEAST FIVE YEARS.

(L) "Volunteer firemen's organization" means any organization of volunteer firemen, as defined in section 146.01 of the Revised Code, that is organized and operated exclusively to provide financial support for a volunteer fire department or a volunteer fire company.

(M) "Fraternal organization" means any society, order, or association within this state, except a college or high school fraternity, that is not organized for profit, that is a branch, lodge, or chapter of a national or state organization, that exists exclusively for the common business or brotherhood of its members, and that has been in continuous existence in this state for a period of five years.

(N) "Volunteer rescue service organization" means any organization of volunteers organized to perform emergency medical

service as defined in division (E) of section 4731.82 of the Revised Code.

(O) "Service organization" means any organization, not organized for profit, that is organized and operated exclusively to provide, or to contribute to the support of organizations or institutions organized and operated exclusively to provide, medical and therapeutic services for persons who are crippled, born with birth defects, or have any other mental or physical defect or THOSE ORGANIZED AND OPERATED EXCLUSIVELY to protect, or to contribute to the support of organizations or institutions organized and operated exclusively to protect, animals from inhumane treatment.

(P) "Nonprofit medical organization" means any organization; ~~not-organized-for profit~~, that ~~is-organized~~ HAS BEEN INCORPORATED AS A NONPROFIT CORPORATION FOR AT LEAST FIVE YEARS and THAT HAS CONTINUOUSLY OPERATED AND WILL BE operated exclusively to

provide, or to contribute to the support of organizations or institutions organized and operated exclusively to provide, hospital, medical, research, or therapeutic services for the public.

(Q) "Senior citizen's organization" means any private organization, not organized for profit, that is organized and operated exclusively to provide recreational or social services for persons who are fifty-five years of age or older and that is described and qualified under subsection 501(c)(3) of the Internal Revenue Code.

(R) "Charitable bingo game" means any bingo game that is conducted by a charitable organization that has obtained a bingo license pursuant to section 2915.08 of the Revised Code and the proceeds of which are used for a charitable purpose.

(S) "Bingo" means:

(1) A game with all of the following characteristics:

(a) The participants use bingo cards that are divided into twenty-five spaces arranged in five horizontal and five vertical rows of spaces, with each space, except the central space, being designated by a combination of a letter and a number and with the central space being designated as a free space;

(b) The participants cover the spaces on the bingo cards that correspond to combinations of letters and numbers that are announced by a bingo game operator;

(c) A bingo game operator announces combinations of letters and numbers that appear on objects that a bingo game operator selects by chance, either manually or mechanically, from a receptacle that contains seventy-five objects at the beginning of each game, each object marked by a different combination of a letter and a number that corresponds to one of the seventy-five possible combinations of a letter and a number that can appear on the bingo cards;

(d) The winner of the bingo game includes any participant who properly announces during the interval between the announcements of letters and numbers as described in division (S)(1)(c) of this section, that a predetermined and preannounced pattern of spaces has been covered on a bingo card being used by the participant.

(2) Any scheme or game other than a game as defined in division (S)(1) of this section with the following characteristics:

(a) The participants use cards, sheets, or other devices that are divided into spaces arranged in horizontal, vertical, or diagonal rows of spaces, with each space, except free spaces, being designated by a single letter, number, or symbol; by a combination of letters, numbers or symbols; by a combination of a letter and a number, a letter and a symbol, or a number and a symbol; or by any combination of letters, numbers and symbols, with some or none of the spaces being designated as a free, complimentary, or similar

space;

(b) The participants cover the spaces on the cards, sheets, or devices that correspond to letters, numbers, symbols, or combinations of such that are announced by a bingo game operator or otherwise transmitted to the participants;

(c) A bingo game operator announces, or otherwise transmits to the participants, letters, numbers, symbols, or any combination of such as set forth in division (S)(2)(a) of this section that appear on objects that a bingo game operator selects by chance that correspond to one of the possible letters, numbers, symbols, or combinations of such that can appear on the bingo cards, sheets, or devices;

(d) The winner of the bingo game is any participant who properly announces that a predetermined and preannounced pattern of spaces has been covered on a card, sheet, or device being used by the participant.

(T) "Conduct" means to back, promote, organize, manage, carry on, or prepare for the operation of a scheme or game of chance but does not include any act performed by a bingo game operator.

(U) "Bingo game operator" means any person, except security personnel, who performs work or labor at the site of a bingo game including, but not limited to, collecting money from participants, handing out bingo cards or objects to cover spaces on the bingo cards, selecting from a receptacle the objects that contain the combination of letters and numbers that appear on the bingo cards, calling out the combinations of letters and numbers, and distributing prizes to the winner of the bingo game, and serving refreshments.

(V) "Participant" means any person who plays bingo by covering the spaces on a bingo card that correspond to combinations

of letters and numbers that are announced by a bingo game operator.

(W) "Bingo session" means a period, not to exceed five continuous hours, during which a person conducts one or more bingo games.

(X) "Gross receipts" means all money or assets, including admission fees, that a person receives from a bingo session that the person conducts without the deduction of any amounts for prizes paid out during the session or for the expenses of conducting the bingo session.

(Y) "Security personnel" includes any person who either is a sheriff, deputy sheriff, marshal, deputy marshal, township constable, or member of an organized police department of a municipal corporation or has successfully completed a peace officer's training course pursuant to sections 109.71 to 109.79 of the Revised Code and who is hired to provide security for the premises on which a bingo game is conducted.

(Z) "To use gross receipts for a charitable purpose" means that the proceeds of the bingo game are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under subsection 501(a) AND DESCRIBED IN SUBSECTION 501(c)(3) of the Internal Revenue Code that the proceeds of the bingo game are used by, or given, donated, or otherwise transferred to a veteran's organization, as defined in division (K) of this section, that is a post, chapter, or organization of war veterans, or an auxiliary unit or society of, or a trust or foundation for, any such post, chapter, or organization organized in the United States or any of its possessions, at least seventy-five per cent of the members of which are individuals who are veterans (but not war veterans) or are cadets, or are spouses, widows or widowers of war veterans,

or such individuals, provided that no part of the net earnings of such post or organization inures to the benefit of any private shareholder or individual, and further provided that the bingo game proceeds are used by the post or organization for the charitable purposes set forth in division (B)(12) of section 4739.02 of the Revised Code, awarding scholarships to or for attendance at an institution mentioned in division (B)(12) of section 5739.02 of the Revised Code, donated to a governmental agency, or used for nonprofit youth activities, promotion of patriotism, or disaster relief; that the proceeds of the bingo game are used by, or given, donated, or otherwise transferred to a fraternal organization that has been in continuous existence in this state for fifteen years for use exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals and

contributions for such use would qualify as a deductible charitable contribution under subsection 170 of the Internal Revenue Code; or that the proceeds of the bingo game are used by a volunteer firemen's organization and are used by the organization for the purposes set forth in division (L) of this section.

(AA) "Internal Revenue Code" means the "Internal Revenue Code of 1954," 68A Stat. 3, 26 U.S.C. 1, as now or hereafter amended.

(BB) "YOUTH ATHLETIC ORGANIZATION" MEANS ANY ORGANIZATION, NOT ORGANIZED FOR PROFIT, THAT IS ORGANIZED AND OPERATED EXCLUSIVELY TO PROVIDE FINANCIAL SUPPORT TO, OR TO OPERATE, ATHLETIC ACTIVITIES FOR PERSONS WHO ARE EIGHTEEN YEARS OF AGE OR YOUNGER BY MEANS OF SPONSORING, ORGANIZING, OPERATING, OR CONTRIBUTING TO THE SUPPORT OF AN ATHLETIC TEAM, CLUB, LEAGUE, OR ASSOCIATION.

(CC) "YOUTH ATHLETIC PARK ORGANIZATION" MEANS ANY ORGANIZATION, NOT ORGANIZED FOR PROFIT, THAT OWNS, OPERATES, AND MAINTAINS PLAYING FIELDS THAT ARE USED AT LEAST ONE HUNDRED DAYS PER YEAR FOR ATHLETIC ACTIVITIES BY YOUTH ORGANIZATIONS AS DEFINED IN DIVISION (BB) OF SECTION 2915.01 OF THE REVISED CODE AND ARE NOT USED FOR ANY PROFIT-MAKING ACTIVITY AT ANY TIME DURING THE YEAR, AND WHICH USES THE PROCEEDS OF THE BINGO GAME EXCLUSIVELY FOR THE OPERATION, MAINTENANCE, AND IMPROVEMENT OF SUCH PLAYING FIELDS.

Sec. 2915.02

(A) No person shall:

. . .

(2) Establish, promote, or operate, or knowingly engage in conduct that facilitates any scheme or game of chance conducted for profit;

. . .

(B) For purposes of division (A)(1)

of this section, a person facilitates bookmaking if he in any way knowingly aids an illegal bookmaking operation, including without limitation placing a bet with a person engaged in or facilitating illegal bookmaking. For purposes of division (A)(2) of this section, a person facilitates a scheme or game of chance conducted for profit if he in any way knowingly aids in the conduct or operation of any such scheme or game, including without limitation playing any such scheme or game.

(C) This section does not prohibit conduct in connection with gambling expressly permitted by law~~; does not apply to schemes~~.

(D) THIS SECTION DOES NOT APPLY TO:

(1) SCHEMES of chance conducted by a charitable organization that is, AND HAS RECEIVED FROM THE INTERNAL REVENUE SERVICE A DETERMINATION LETTER THAT IS CURRENTLY IN EFFECT, STATING THAT THE ORGANIZATION IS, ~~tax~~ exempt FROM FEDERAL INCOME TAXATION under

subsection 501(a) AND DESCRIBED IN SUBSECTION 501(c)(3) of the Internal Revenue Code, provided that all of the money or assets received from such scheme of chance after deduction only of prizes paid out during the conduct of the scheme of chance are used by, or given, donated, or otherwise transferred to, any organization that is described in subsection 509(a)(1), 509(a)(2), or 509(a)(3) of the Internal Revenue Code and is either a governmental unit or an organization that is tax exempt under SUBSECTION 501(a) AND DESCRIBED IN subsection 501(c)(3) of the Internal Revenue Code. AND PROVIDED THAT THE SCHEME OF CHANCE IS NOT CONDUCTED DURING, OR WITHIN TEN HOURS OF, A BINGO GAME CONDUCTED FOR AMUSEMENT PURPOSES ONLY PURSUANT TO SECTION 2915.12 OF THE REVISED CODE; ~~and does not apply to games of chance, except~~

(2) GAMES OF CHANCE, IF ALL OF THE FOLLOWING APPLY:

(a) THE GAMES OF CHANCE ARE NOT craps for money, roulette for money, ~~and~~ OR slot machines; ~~that are~~;

(b) THE GAMES ARE conducted by A charitable ~~organizations~~ ORGANIZATION that ~~are tax~~ IS, AND HAS RECEIVED FROM THE INTERNAL REVENUE SERVICE A DETERMINATION LETTER THAT IS CURRENTLY IN EFFECT, STATING THAT THE ORGANIZATION IS, exempt FROM FEDERAL INCOME TAXATION under SUBSECTION 501(a) AND DESCRIBED IN subsection 501(c)(3) of the Internal Revenue Code; ~~at the organizations' festivals, if the~~;

(c) THE GAMES ARE CONDUCTED AT festivals OF THE ORGANIZATION THAT are conducted for a period of four consecutive days or less and not more than twice a year, AND ARE CONDUCTED ON PREMISES OWNED BY THE CHARITABLE ORGANIZATION FOR A PERIOD OF NO LESS THAN ONE YEAR IMMEDIATELY PRECEDING THE CONDUCTING OF THE GAMES OR ON PREMISES LEASED FROM A GOVERNMENTAL UNIT;

(d) ALL OF THE MONEY OR ASSETS

RECEIVED FROM THESE GAMES OR CHANCE AFTER DEDUCTION ONLY OF PRIZES PAID OUT DURING THE CONDUCT OF THE GAMES OF CHANCE ARE USED BY, OR GIVEN, DONATED, OR OTHERWISE TRANSFERRED TO, ANY ORGANIZATION THAT IS DESCRIBED IN SUBSECTION 509(a)(1), 509(a)(2), OR 509(a)(3) OF THE INTERNAL REVENUE CODE AND IS EITHER A GOVERNMENTAL UNIT OR AN ORGANIZATION THAT IS TAX EXEMPT UNDER SUBSECTION 501(a) AND DESCRIBED IN SUBSECTION 501(c)(3) OF THE INTERNAL REVENUE CODE;

(e) THE GAMES ARE NOT CONDUCTED DURING, OR WITHIN TEN HOURS OF, A BINGO GAME CONDUCTED FOR AMUSEMENT ONLY PURSUANT TO SECTION 2915.12 OF THE REVISED CODE.

NO PERSON SHALL RECEIVE ANY COMMISSION, WAGE, SALARY, REWARD, TIP, DONATION, GRATUITY, OR OTHER FORM OF COMPENSATION, DIRECTLY OR INDIRECTLY, FOR OPERATING OR ASSISTING IN THE OPERATION OF ANY SCHEME OR GAME OF CHANCE.

(E) DIVISION (D) OF THIS SECTION SHALL NOT BE CONSTRUED TO AUTHORIZE THE

SALE, LEASE, OR OTHER TEMPORARY OR PERMANENT TRANSFER OF THE RIGHT TO CONDUCT SCHEMES OF CHANCE OR GAMES OF CHANCE, AS GRANTED BY DIVISION (D) OF THIS SECTION, BY ANY CHARITABLE ORGANIZATION THAT IS GRANTED THAT RIGHT.

~~(B)~~ (F) Whoever violates this section is guilty of gambling, a misdemeanor of the first degree. If the offender has previously been convicted of any gambling offense, gambling is a felony of the fourth degree.

Sec. 2915.09

(A) A charitable organization that conducts a bingo game shall:

. . .

(2) Use all of the gross receipts from the bingo game for paying prizes, for the charitable purposes listed in its bingo license application, for purchasing or leasing bingo cards and other equipment

used in conducting the bingo game, ~~for~~ hiring security personnel for the bingo game, for OR advertising the bingo game PROVIDED THAT THE AMOUNT OF THE RECEIPTS SO SPENT IS NOT MORE THAN IS CUSTOMARY AND REASONABLE FOR A SIMILAR PURCHASE, LEASE, HIRING, OR ADVERTISING, ~~and~~ for renting premises in which to conduct the bingo game, AND FOR THE MAINTENANCE, EXPENSE, AND COST OF A BUILDING OWNED BY THE CHARITABLE ORGANIZATION IN WHICH THE BINGO GAME IS CONDUCTED, EXCEPT THAT, FOR EACH BINGO SESSION, THE TOTAL AMOUNT OF THE GROSS RECEIPTS USED FOR THE MAINTENANCE, EXPENSE, AND COST OF THE BUILDING SHALL NOT EXCEED THE LESSER OF TWO HUNDRED FIFTY DOLLARS OR TWENTY-FIVE PER CENT OF THE GROSS RECEIPTS FROM THE SESSION;

. . .

(E) Whoever violates division (A)(2) of this section is guilty of illegally conducting a bingo game, a gelony of the third degree. Whoever violates division (A)(1),

~~(A)~~(3), ~~(A)~~(4), ~~(A)~~ OR (5), or (B)_, OR (C) of this section is guilty of a minor misdemeanor. If the offender has previously been convicted of a violation of division (A)(1), ~~(A)~~(3), ~~(A)~~(4), ~~(A)~~ OR (5), or (B)_, OR (C) of this section, a violation of division (A)(1), ~~(A)~~(3, ~~(A)~~(4),~~(A)~~ OR (5), or (B)_, OR (C) of this section is a misdemeanor of the first degree.

OHIO REVISED CODE

Sec. 2923.04 Engaging in organized crime.

(A) No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:

(1) Organize or participate in organizing a criminal syndicate or any of its activities;

(2) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;

(3) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;

(4) Furnish legal, accounting, or other managerial services to a criminal syndicate;

(5) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing

basis;

(6) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of section 2921.02 of the Revised Code.

(B) Whoever violates this section is guilty of engaging in organized crime, a felony of the first degree.

(C) As used in this section, "criminal syndicate" means five or more persons collaborating to promote or engage in any of the following on a continuing basis:

(1) Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revised Code;

(2) Compelling or promoting prostitution, or procuring in violation of section 2907.21, 2907.22, or 2907.23 of the Revised Code;

(3) Any theft offense as defined in section 2913.01 of the Revised Code;

(4) Any gambling offense as defined

in section 2915.01 of the Revised Code;

(5) Illegal trafficking in drugs of abuse, in intoxicating or spiritous liquor, or in deadly weapons or dangerous ordnance as defined in section 2923.11 of the Revised Code;

(6) Lending at usurious interest, and enforcing repayment by illegal means;

(7) Any offense, for the purpose of gain.

(D) A criminal syndicate retains its character as such even though one or more of its members does not know the identify of one or more other members, and even though its membership changes from time to time.

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO,	)	CASE NO. 78-06-0663
	)	
Plaintiff,	)	JUDGE JOSEPH KAINRAD
	)	
-vs-	)	SUPPLEMENTARY AFFIDAVIT IN SUPPORT OF EVIDENTIARY HEARING ON SEARCH WARRANT AFFIDAVIT
	)	
JOSEPH FRANCIS MERLO, et al.,	)	
	)	
Defendants.	)	

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

George Wm. Palda, being first duly sworn on oath, according to law, deposes and states that:

1. I am one of the attorneys for Joseph Francis Merlo and Nancy Merlo in the above-captioned matter.

2. As a result of my representation of the above-named clients, I gained knowledge of facts which demonstrated that false statements, knowingly and intentionally, or with reckless disregard of the truth, were included by Det. Eugene L. Maurer in the affidavit he signed for the search warrants

obtained in connection with this case on June 9, 1978.

3. As a result of this knowledge, I swore to and filed with this Court, for an in camera inspection, an affidavit in support of an evidentiary hearing. That affidavit is hereby incorporated by reference herein and is attached as Exhibit A.

4. Since the filing of the affidavit referred to in paragraph 3 above (Exhibit A), I have gained further knowledge of facts which show other false statements, knowingly and intentionally, or with reckless disregard of the truth, were included by Det. Eugene Maurer, in the affidavit which he signed for the search warrants obtained in connection with this case on June 9, 1978.

5. In paragraph number five (5) of the recitation of facts on the fourth page in the search warrant affidavit, Detective Maurer claimed that "the receipts and nightly records from each of the bingo games" were "traced by surveillance from the bingo

halls to the residences of the operators and then traced the following day to an apartment in Akron, Ohio, owned by Joseph Francis Merlo...."

6. The facts which Detective Maurer listed, in the same paragraph, in support of the conclusion of a transfer of records and receipts were that "canvas bags" were taken from the Lakemore Bingo Hall by Ray and Cecilia Parks to their residence.

7. Detective Maurer also stated in paragraph number five of his affidavit that Cecilia Parks "loads the bags back into the Pinto...and transports them to Joseph Merlo's apartment...." Detective Maurer continued in his affidavit that "[a]fter the money from both games has arrived at the Merlo apartment, the pattern has consistently been the same....Sandy Brunton... would arrive at the Merlo apartment, and would take from the apartment the same canvas bags. She would then transport them

to her residence...." (Emphasis added).

8. The statements by Detective Maurer that the same canvas bags were transported from the bingo halls to the operators' residences, then to Joseph Merlo's apartment and then to Sandra Brunton's apartment are false.

9. At the time Detective Maurer signed the affidavit, surveillance, in which he had participated and was aware, demonstrated clearly that the canvas bags which came from the bingo halls were not seen being taken from the operators' residences and transported to Joseph Merlo's apartment. Nor was Sandra Brunton seen taking the same canvas bags from the Merlo apartment to her residence.

10. Sworn testimony in the related case of State v. Bruce Miller by Summit County Sheriff's Department personnel, including Detective Maurer, demonstrates that collored canvas bags, green in color, were taken from the Lakemore Bingo Hall by Ray Parks (testimony of Detectives Maurer, Padrutt and Bryant).

11. The testimony of Detectives Maurer, Padrutt and Bryant showed that neither Ray nor Cecilia Parks ever were seen leaving their residence and bringing green or other colored canvas bags to the Merlo residence. Their testimony shows that Cecilia Parks was seen only with a large brown vinyl suit bag. This testimony is confirmed by the surveillance photographs taken at the Parks residence and the Merlo apartment by the detectives and presently on file with the Court in the related case of State v. Bruce Miller.

12. The same surveillance photographs also show that Sandra Brunton was not observed with the same green or colored canvas bags as were taken from the bingo halls.

13. The testimony of Detective Maurer in the related case of State v. Miller and the surveillance photographs show that Harry Blackford was seen going to and at the Merlo apartment only with a tan canvas gym bag. This testimony is confirmed by surveillance

photographs on file in the related case of State v. Miller.

14. If the false statements are deleted from the affidavit for the search warrant submitted by Detective Maurer, there is no factual connection between the bingo halls and the Merlo or Brunton residences and no probable cause to support a search of those residences or the automobiles belonging to defendants Merlo or defendant Brunton.

15. If the false statements concerning transportation of receipts and records are deleted from the affidavit along with the other false statements which were included in the Maurer affidavit and shown in the affidavit previously submitted by me, there was no probable cause to issue any search warrants.

16. The affiant requests an in camera inspection of these affidavits by this Court.

18. Further the affiant sayeth naught.

/S/_____
George Wm. Palda

SWORN TO BEFORE ME and subscribed in my presence this 8th day of February, 1979.

/S/_____
J. Michael Murray
Notary Public

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO,	)	CASE NO. CR78-06-0663
	)	
Plaintiff,	)	JUDGE JOSEPH KAINRAD
	)	
-vs-	)	AFFIDAVIT IN SUPPORT OF EVIDENTIARY HEARING ON SEARCH WARRANT AFFIDAVIT
	)	
JOSEPH FRANCIS MERLO, et al.,	)	
	)	
Defendants.	)	

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

George Wm. Palda, being first duly sworn according to law, deposes and states that:

1. He is the attorney for Joseph Francis Merlo and Nancy Merlo in the above-captioned matter.

2. As a result of his representation of the above-named clients, he has gained knowledge of facts which show false statements, knowingly and intentionally or with reckless disregard of the truth, were included by Det. Eugene L. Maurer, in the

affidavit for the search warrants obtained in connection with this case on June 9, 1978.

3. In paragraph two of the recitation of facts in the affidavit, Det. Maurer claimed that the attendance shown by the bingo operators at both locations in the reports submitted to the Attorney General were inconsistent with the actual counts taken by the Attorney General during formal audits.

4. In paragraph three of the recitation of facts in the affidavit, Det. Maurer stated that the average daily reported figures for the Mahoning Plaza bingo game from the reports submitted by the operators to the Attorney General were not available at the time the affidavit was signed.

5. Both of the above statements by the affiant are false.

6. The statement by Det. Maurer in paragraph three in regard to the unavailability of average daily figures is false from the face of the affidavit. Det. Maurer

stated in paragraph one of the recitation of facts that he reviewed all the audits of the two bingo games named in the affidavit for the warrants. Det. Maurer also stated in paragraph two of the recitation of facts that he had reports from both of the bingo games which were submitted to the Attorney General. The average daily figures for the Mahoning game were available both from the audits and the reports to the Attorney General which Det. Maurer states were in his possession.

7. The statement by Det. Maurer in paragraph two of the recitation of facts in the affidavit concerning the inconsistency in attendance figures can be shown to be false by an examination of the reports submitted to the Attorney General and the audit reports supplied to Det. Maurer by the Attorney General's office, both of which Det. Maurer reviewed according to his statements in the affidavit.

8. If the attendance figures listed in the audit which were available to Det.

Maurer but omitted from the affidavit had been included, the audit figures would have been consistent with the attendance figures in the reports filed by the bingo operators with the Attorney General.

9. If the average daily reported figures for the Mahoning Plaza bingo game which were available to Det. Maurer had been included in the affidavit, they would have been consistent with the gross receipts figures of the audits conducted at the Mahoning Plaza bingo game which were listed in paragraph three of the recitation of facts by Det. Maurer.

10. If the false statements set out above are struck from the affidavit for the search warrants, sufficient probable cause for the issuance of the warrants would not exist.

11. Further the affiant sayeth naught.

_____

George Wm. Palda

SWORN TO BEFORE ME and subscribed in my presence this _____ day of January, 1979.

_____
Notary Public

STATE OF OHIO)
) SS:
SUMMIT COUNTY)

AFFIDAVIT FOR SEARCH WARRANT

The undersigned, being duly sworn, deposes and says:

My name is EUGENE L. MAURER, I am a detective with the Summit County Sheriff's Office, assigned to the Organized Crime Unit. I have been engaged in the investigation of illegal bingo in Summit County since February of 1977 when the Ohio laws relating to bingo changed. I have been engaging in an investigation of the Boardwalk Bingo in the Lakemore Plaza, Village of Lakemore, Ohio, and in the Mahoning Plaza Bingo in the Mahoning Plaza in Canton, Ohio, since April of 1977. Our investigation has revealed that the two games listed above are conducted in violation of Ohio Revised Code 2915.09 and 2923.04. Affiant further states that supplies, books and records and proceeds of illegal games and gambling

paraphernalia are being kept at the following locations and that these items are evidence of the crimes of Conducting An Illegal Bingo Game, in violation of 2915.09 and Engaging In Organized Crime, in violation of 2923.04, or are fruits of those crimes:

1) The Lakemore Plaza Bingo Hall, located in Rooms 128-170 at the Lakemore Plaza at 1900 Canton Road, Village of Lakemore, Ohio, and further described as a single story commercial structure, brick with sidewalk overhang, with glass fronts, with front and rear multiple entrance and exit doors, and further having a large hall interior and an office within that hall, and further having a large sign over the sidewalk overhand in the front that says Boardwalk Bingo.

2) The Mahoning Plaza Bingo Hall, located at the Mahoning Road Plaza at 2915 Mahoning Road, Canton, Ohio, and further described as a one story commercial structure, brick and steel with a glass front with multiple entrance and exit doors at both front

and rear and further having a sign with the word Bingo, and further described as a large hall interior with an office inside the hall.

3) An apartment, Number 2-A, located at 1342 Weathervane Lane in Cedarwood Village in Akron, Ohio, and further described as a three story brick structure, natural and brown, containing multiple apartments and specifically, this apartment being identified as apartment 2-A on the second floor in the main section of the building, described as 1342 Weathervane Lane, and known as the residence of Joseph Francis Merlo and Nancy Kungle Merlo.

4) A two story frame house, wood and aluminum siding in white with green shutters with an attached front porch and front, side and rear entrance doors. A single family dwelling, located at 877 Chalker Avenue, Akron, Ohio and known as the residence of Raymond J. Parks and Cecelia Blackburn Parks and is also the business address of A. A. A. Concessions.

5) A single family residence described as a two story frame dwelling, with wood and aluminum siding, white in color with a garage and front, rear and garage entrance doors, located at 5982 Kungle Road in Franklin Township, Clinton, Ohio and known to be the residence of Harry S. Blackford and also the business address of City Novelty.

6) A single family residence, described as a one story frame dwelling with wood siding, white in color, with a garage and front and rear entrance doors and garage doors, located at 1321 Benton Avenue, Barberton, Ohio and known as the residence of Gerald Hall.

7) A single family residence, described as a two story frame dwelling with wood siding, yellow in color, with front, side and rear entrance doors, and located at 2345 Iota Avenue, Cuyahoga Falls, Ohio, and further known as the residence of Sandra Brunton.

8) Two buildings located at 767 North Howard Street in the City of Akron, Ohio, and further described as the first building being a two story commercial and residential wood frame structure, white in color, with a front attached porch, and front, side and rear entrance doors. The second building being a detached garage, wooden frame structure, white in color, with two car capacity to the rear of the building described as 767 North Howard Street. Those buildings being the business address for City Supply Company.

9) An apartment and attached garage, described as apartment number 5 in the Executive Townhouse Apartments, located at 338 East Portage Trail, in the City of Cuyahoga Falls, Ohio. The entrance to this apartment building is on School Street, and the garage is attached as part of the building that physically houses the apartment.

10) A 1978 Jaguar Coupe, Ohio registration 313068, chocolate brown in color, the owner being Nancy Kungle, 877 Chalker Street, Akron, Ohio.

11) A 1978 Cadillac Coupe, Ohio registration D-917-K, brown over brown in color, the owner being Dameco, Inc. (Leasing Company), Tallmadge, Ohio.

12) A 1976 Pinto Station Wagon, Ohio registration D-334-K, brown in color, with wood panels, the owner being Cecelia Blackburn (Parks), 767 North Howard Street, Akron, Ohio.

13) A 1977 Cordoba Coupe, Ohio registration B-1564-R, rust in color with a black vinyl top, the owner being Harry S. Blackford, 5982 Kungle Road, Clinton, Ohio, said vehicle has no front license plate.

14) A 1971 Chevrolet Impala, Ohio registration C-135-J, black and metallic blue in color, the owner being Jeannie Turkovich, 1033 Perry Avenue, Norton, Ohio.

15) A 1974 four-door, full size Oldsmobile, Ohio registration 292976, black and brown in color, the owner being Sandra Brunton, 2345 Iota Avenue, Cuyahoga Falls, Ohio.

16) A 1972 two-door full size Buick, Ohio registration A-9381-G, maroon in color with a black vinyl top, the owner being Gerald Hall, 1033 Perry Avenue, Norton, Ohio.

17) A 1974 four-door Oldsmobile Sedan, maroon in color, VIN number 3V39T4E118678, owned by Nancy J. Kunkel, 877 Chalker Street, Akron, Ohio.

THIS KNOWLEDGE IS BASED ON THE FOLLOWING FACTS:

1. The affiant has been involved in investigation of illegal bingo activities in this county since February of 1977 and has been in charge of all illegal bingo activity investigation in this county since January of 1978. In that capacity, the affiant has directed the activities of all sheriff's

personnel assigned to investigate illegal bingo, has reviewed all the reports concerning their investigations, and has coordinated the investigation with the Ohio Attorney General's Office and has reviewed all the audits of all the bingo games conducted in this county, specifically the two games in this Affidavit for Search Warrant.

2. Affiant has been directly involved in the investigation of the two listed bingo games since April of 1977, and has personally observed and read reports of the other police officers who observed the games on a regular basis. During this time period crowd estimates have been made by Summit County Deputy Sheriffs under the affiant's command, and in the 20 plus times that estimates were made they range from 400 to 650 people attending each game on a given evening. These estimates were confirmed by the two most recent estimates of Sunday, June 4, 1978 and Thursday, June 8, 1978. Attorney General reports in my possession indicate

that the bingo operators at both locations report an average crowd of 300 to 400 people per night. This is inconsistent with the estimates of the Sheriff's Department, and the actual counts taken by the Attorney General during their formal audits.

3. Based on my experience investigating prior bingo games, the average bingo player spends between $14.00 and $18.00 per game. The formal audits by the Attorney General's Office conducted at both these games support these estimates. The formal audit by the Ohio Attorney General of the Lakemore Plaza Bingo game on March 23, 1978 revealed gross receipts of $8,387.30. A formal audit of the Lakemore Plaza Bingo game on March 24, 1978 revealed gross receipts of $6,833.00. Formal audits by the Attorney General at the Mahoning Road Bingo game indicate the following gross receipts and dates: On January 12, 1978, $4,442.50; on February 17, 1978, $5,924.60; on February 18, 1978, $6,383.95;

and on February 19, 1978, $4,795.75. Reports from the Ohio Attorney General reveal that the average daily gross receipts reported, as required by statute, to the Attorney General's Office by the conductors of the Lakemore Plaza Bingo game is $4,174.00. Average daily reported figures from the Mahoning Plaza Bingo game are not available at this time. Multiplying the average nightly expenditure of $15.00 times the variable crowd estimates of between 400 and 600, the average gross receipts for the bingo alone is between $6,000.00 and $9,000.00 per night, per game. This figure does not include sales of instant bingo tickets or concession sales.

4. From conversations with representatives of the Attorney General's Office and from reviewing their audit reports, the affiant has learned that for the time from September, 1977 to April, 1978, the Lakemore Plaza Bingo paid to the Great Martyr

Demetrius Charity, which had the license for Friday and Saturday nights, the sum of $500.00 per week, and paid to the Great Temple Baptist Church, who held the license for Thursday and Sunday nights, the sum of $1,000.00 per week. The affiant also learned that The Great Martyr Demetrius Church has re-negotiated its weekly payments from $500.00 to $800.00 per weekend. The two charities that hold licenses at Mahoning Plaza report income for the bingo to the Attorney General on an average of $500.00 per night. The affiant states that it has been his experience in reviewing the records of other games that Friday and Saturday nights are substantially more lucrative than Thursday and Sunday nights.

5. The receipts and nightly records from each of the bingo games have been traced by surveillance from the bingo halls to the residences of the operators and then traced the following day to an apartment in Akron,

Ohio, owned by Joseph Francis Merlo, listed in paragraph 3 above. The money is traced leaving Merlo's apartment in the possession of his sister, Sandy Brunton, on Sundays and has since been traced being dropped off by her the following day at the Executive Townhouse Apartments, listed in paragraph 9 above. This pattern of transporting the money and records in large canvas bags from both games was established on April 6, 1978 and continually confirmed until the most recent surveillance of June 5, 1978. Surveillance has indicated a consistent pattern at the Lakemore Bingo Hall of Ray and Cecelia Parks loading the canvas bags into their Pinto station wagon, listed in paragraph 12 above, and transporting those bags to their residence at 877 Chalker Street, listed in paragraph 4 above. The pattern has also consistently shown that on Sunday mornings, Cecelia Parks loads the bags back into the Pinto station wagon and transports them to

Joseph Merlo's apartment at 1342 Weathervane Lane, listed in paragraph 3 above. On one occasion, she did use the 1974 Oldsmobile, named in paragraph 15 above, to transport these bags. This occurred on May 28, 1978.

The pattern from the Mahoning Plaza game has also been consistent. The money and records leave the Mahoning Plaza game in similar large canvas bags and is always transported by Gary Hall from the game to his residence at 1321 Benton Avenue, listed in paragraph 6 above. On all but one occasion he drove the 1972 Buick, listed in paragraph 16. On one occasion he used the 1971 Chevrolet Impala, listed in paragraph 14. On each of the following Sunday mornings, Harry S. Blackford stops at the Hall residence and picks up the money. He transports the money in his 1977 Cordoba, listed in paragraph 13 above, from the Hall residence to Joseph Merlo's apartment at 1342 Weathervane Lane in Cedarwood Village, Akron, Ohio.

After the money from both games has arrived at the Merlo apartment, the pattern has consistently been the same. Later on Sunday afternoon, Sandy Brunton, Joseph Merlo's sister, would arrive at the Merlo apartment, driving the 1974 Oldsmobile listed in paragraph 15 above, and would take from the apartment the same canvas bags. She would then transport them to her residence, listed in paragraph 7 above. On June 5, 1978, she was observed transporting the bags from her apartment on Iota Avenue to apartment number 5 in the Executive Townhouse Apartments, listed in paragraph 9 above. On that occasion, she pulled into the garage attached to that apartment and was observed as the door was closing, carrying a large bag.

6. The residence listed in paragraph 5 above, known as 5982 Kungle Road, and the home of Harry S. Blackford, is also the business address for City Novelty, which is a supplier of bingo supplies to the Lakemore

Plaza Bingo game. This information is based on receipts and sales slips that were received from the Attorney General's Office that list an address for City Novelty of a Post Office Box in Barberton. A check by the affiant with the postal authorities in Barberton indicate that that box is leased by City Novelty, giving an address of 5982 Kungle Road, Clinton, Ohio. In addition, records received from the Attorney General's Office indicate that pursuant to required filings in June of 1977, Harry Blackford was the manager of the Mahoning Plaza Bingo game. Based on the affiant's experience in the bingo business, the receipts and sales slips from City Novelty to both the Lakemore Plaza and the Mahoning Plaza games reveal that the prices charged for the items sold are inflated and not competitive with the market in this area. This is a method of skimming money from the game to the operators and promoters. On additional piece of

evidence relating to this residence is the fact that Harry S. Blackford has endorsed checks that were passed at the Lakemore Plaza Bingo game. One additional item, the receipts given for the initial purchase of bingo cards, the so called admission fee receipts, that are given at the Lakemore Plaza Bingo game list the address of the Mahoning Plaza Bingo game on the face of the receipt.

7. Relating to the two guildings located at 767 North Howard Street and listed in paragraph 8 above, the affiant states from his personal knowledge, that records in the Sheriff's Department Identification Bureau indicate that when Ray Parks was arrested in March of 1978, in unrelated charges, he listed as his occupation the owner of City Supply, and listed as its business address 767 North Howard Street. Based on sales receipts received and reviewed by this affiant, City Supply has made numerous sales of bingo supplies to the Lakemore Plaza

Bingo game. Based on this affiant's experience, the prices charged in those sales are excessive and not competitive with local market prices. This is a way, based on this affiant's experience, that operators of games skim money from the games themselves. Based on records obtained from the Ohio Attorney General's Charitable Foundations section, the address of 767 North Howard Street is also the residence given by Herb Soyk. Mr. Soyk is the caller for the bingo game at the Lakemore Plaza. Mr. Soyk's personal automobile has been observed at that address by this affiant on several occasions. This affiant has observed that the windows of the house and the garage located at 767 North Howard Street, are blocked either by paper or painting in warehouse fashion.

8. The affiant states that based on information received from the Attorney General's Office, both City Novelty and Triple A Concession maintain an office in

the hall at Mahoning Plaza. This information was based on personal observations by Attorney General staff members conducting audits at that location.

9. Based on the surveillance of both locations, no large packages leave the halls except the canvas bags mentioned above. The persons carrying the bags are excorted to their vehicles by armed uniformed officers working security at the games.

10. Experience from previous investigations where records had been stored in the trunks of automobiles, coupled with the observations of other records and files in the trunk of Harry Blackford's car, listed in paragraph 13 above, and the mobile nature of the businesses leads the affiant to believe that records are being stored in the trunks of the various listed automobiles and that those automobiles are being used every weekend (the period of this requested warrant) to transport bingo supplies, records

and proceeds.

Further, affiant sayeth naught.

/S/_____
EUGENE L. MAURER, Affiant
Summit County Sheriff's
Department

Sworn to by said DETECTIVE EUGENE L. MAURER, and subscribed in my presence this 9th day of June, A.D., 1978.

/S/ William R. Baird
JUDGE, Common Pleas
Court, Summit County,
Ohio

EXCERPTS FROM TRIAL COURT
TRANSCRIPT OF PROCEEDINGS

Volume II, page 6:

"...we are arguing that the Indictment must be dismissed for eight separate grounds. To begin with the first ground, we allege that the Indictment is vague and indefinite, and violates rules set forth in Russell v. United States 369 U.S. 769, decided 1962, which holds that an Indictment must provide all of the essential elements of the crime, and also provide adequate notice so that a Defendant may prepare his defense and also provide definite and detailed descriptions of the offense charged in order to allow a Defendant to plead an acquittal or conviction in any subsequent case."

Volume II, pages 15-16:

"That is 2915.09(A)(2), and the general gambling 2915.02(A)(2), and it is our position that all three counts must be

dismissed because the gambling statutes are unconstitutional in that the irrational, arbitrary classification, scheme is in violation of due process and the equal protection clauses of the Fourteenth Amendment.

Our argument on that, on those grounds, as that first of all, the bingo statute fails to supply any standards whatsoever for a Defendant to control or guide his conduct. The statute specifies that expenditures no more than customary and reasonable for similar purchases, so on; customary and reasonable are no where defined.

Furthermore, the statute imposes criminal liability if the State were able to prove that an expenditure wasn't customary and reasonable for similar purchases. Not even identical acts which the Defendants committed. All the State need to do is somehow analogize to other acts in order to impose criminal liability. A statute of this nature is unconstitutional because it is clearly

arbitrary in imposing criminal liability, and therefore must fail."

. . .

Volume III, page 47:

. . .

"Mr. Palda: Your Honor, to state our argument on the ground that the search against the Merlos was unconstitutional and the evidence should be suppressed, one of the grounds is that the warrant was over-broad and vague and we would join in the argument put forth by Mr. Glinsek. But I would add that the warrant directing any law enforcement officer to search the apartment of the Merlos stated that for certain property, namely: Supplies, books, and records, and proceeds of the illegal gains and gambling paraphernalia, which is evidence of a criminal offense or the fruits of that crime, to-wit: Engage in organized crime and conducting an illegal bingo game."

. . .

EXCERPT FROM PETITIONERS'
REPLY BRIEF TO THE OHIO COURT OF APPEALS

. . .

"If there had been any misunderstanding concerning the parties' positions with regard to the negotiated no contest pleas, there was full opportunity at the hearing at which the stipulation of facts was recited, the pleas taken, the motion for acquittal made and overruled, to raise the State's new-found concern about the no-contest plea. It is clear from the record that the trial court understood quite well that appellant Joseph Merlo was not contesting the stipulated facts but he was contesting that they proved his guilt of the commission of any of the crimes charged in the indictment.

"At this late juncture, the State should not be allowed to take its choice of which terms of a negotiated plea to accept."

. . .

CONSTITUTION OF OHIO

Article I, Section 10

§10 [Trial of accused persons and their rights; depositions by state and comment on failure of accused to testify in criminal cases].

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to

demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

PROPOSITIONS OF LAW
PRESENTED TO THE OHIO SUPREME COURT

II.

Where a defendant enters a plea of no contest pursuant to plea bargaining negotiations in which the sole predicate for the plea of no contest is a stipulation of facts which is to be tested for sufficiency of proof of the essential elements of the crime charged, due process requires that the convictions and sentences in a no contest plea be vacated and the case remanded for further proceedings if the defendant is not permitted to challenge the sufficiency of the evidence presented in the stipulation of facts.

III.

Where affidavits submitted to a trial court identify specific portions of a search warrant affidavit which are material to a finding of probable cause but which are false, and proof of deliberate falsity

or reckless disregard of truth by the search warrant affiant is offered by reference to sworn testimony of the affiant and his informants, and by reference to exhibits introduced in evidence in a related case, a sufficient showing of falsity or reckless disregard for the truth for material facts of the search warrant affidavit has been made to require an evidentiary hearing to ascertain whether there have been Fourth Amendment violations.

IV.

Where a search warrant issues pursuant to an affidavit which contains only conclusory allegations without supplying the underlying facts and circumstances to support the conclusions and where the warrant fails to supply sufficient particularity of the articles to be seized, suppression of the evidence seized is required under the Fourth Amendment of the United States Constitution.

IV(A).

Suppression was required because the warrants were issued without probable cause.

IV(B).

Suppression was required because the warrants were overbroad and vague.

V.

Where a criminal statute fails to supply clear notice of prohibited conduct and ascertainable standards of guilt, it is violative of standards of due process under the Fourteenth Amendment of the United States Constitution.

VI.

Where an indictment charges defendant with a violation of a criminal statute during an eight month period of time and during said period the statute is substantially amended with respect to the conduct which is prohibited, the indictment fails to supply adequate notice of the crime charged,

in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Supreme Court, U. S.
FILED
OCT 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-460

In the Supreme Court of the United States

October Term, 1980

JOSEPH FRANCIS MERLO, RAYMOND PARKS, HARRY BLACKFORD,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE FACTS

An audit by the accountant with the Attorney General's Charitable Foundation Section revealed that bingo games conducted at Mahoning Plaza, Canton, Ohio, and at Lakemore Plaza, Summit County, Ohio had amounts of money remaining after the distribution of substantial prizes. The amounts of money left over from the games monitored by the accountant ranged from $2,148.00 to $7,-400.00 per night (Miller Transcript, Volume 1 pages 48-55). According to the accountant, 80 session average after prizes for Summit County was $1,509.00, and the 124 session average for Mahoning County was $1,700.00.

Following the audit, a pattern of surveillance of the bingo games was conducted by the Summit County Sheriff's Office. This surveillance is set out in Petitioners' brief and will not be duplicated in full. However, certain additions are necessary.

On Sunday, April 30, Officer Padrutt was assigned to the surveillance of the Merlo residence at 1342 Weathervane Lane. On this date, Petitioner Joe Merlo was observed leaving his residence around the same time that Harry Blackford was observed exiting the back of the apartment building. Petitioner Joe Merlo was later observed arriving back at the apartment with Ray Parks. Merlo carried a green bag from his car into the apartment. This was the same type of green bag that Ray Parks was seen carrying from Boardwalk Bingo in Lakemore Plaza (Transcript of Miller, Volume II, pages 410-411). Several canvas bags of different colors, including two green bags were seized from Sandra Brunton's apartment and car. All of the bags contained cash and bingo receipts (Miller Transcript, Volume III, page 37).

Surveillance disclosed that the canvas bags were transported by Sandra Brunton from her home at 2345 Iota Avenue to 338 East Portage Trail, Cuyahoga Falls, Ohio (Miller Transcript, Volume III, pages 30-32). Detective Bryant testified that she was admitted into the apartment by an unidentified male through the garage. Upon execution of the search warrant for that apartment, it was found to be vacant except for canvas (bank) bags, bingo records and a written lease for the property in the name of Harry Blackford.

Paula Brailer, of Akron, testified that she was a former employee of City Novelty and that she had worked at Mahoning Plaza in Canton. She testified that she worked as a checker in bingo games. Ms. Brailer stated that

she had worked in other bingo games before. Brailer testified that Harry Blackford was her boss and that she had been paid by check every two weeks (Miller Transcript, Volume II, pages 305, 306, 308). She stated that she knew Joe Merlo but that she had never seen him in Canton. Brailer testified that she had attended a meeting in September 1977 regarding the hiring of personnel for the Lakemore Plaza Bingo Game. Joe Merlo, Harry Blackford and someone named "Ray" were present during the meeting (Transcript of Miller, Volume II, page 312).

Laurie Leggitt testified that she was employed as head cashier for Lakemore Bingo by Ray Parks in September 1977 (Miller Transcript, Volume II, page 319). Leggitt testified that after receiving the money from the checkers each evening she would count it, wrap it in money bands and tally the amounts on a summary sheet. The money was then placed in a canvas bag and left in the office (Transcript of Miller, Volume II, page 321). State's Exhibits 12, a red suitcase seized from the Merlo residence, contained several packets of bingo records for Lakemore and Mahoning Plaza Bingo. Leggitt identified State's Exhibit 1 of the packets, as containing the head checker sheets and callers sheets that she collected when she tallied the money. Leggitt recognized the second sheet from the top as being the one she had filled out each evening. She did not recognize the top sheet attached to each packet (Transcript of Miller, Volume II, pages 328, 329, 332).

State's Exhibit 9, in part was a banded packet of money which contained Laurie Leggitt's fingerprint on the band (Transcript of Miller, Volume III, pages 6-7). This packet of money was delivered to Attorney Roetzel on April 4 (Miller Transcript, Volume II, page 354; Volume III, pages 4-7).

The red suitcase, State's Exhibit 12, found in the Merlo apartment contained packets of bingo records for the Akron and Canton bingo halls. The packets contained the head checker sheet, caller sheets and tally sheets, which the evidence shows were collected and prepared by the head checker each evening. The top sheet attached to each packet was in Sandra Brunton's handwriting (Transcript, page 72). State's Exhibit 72, a small red binder notebook, was seized from Sandra Brunton's apartment. The writing in the notebook was Brunton's (Transcript, page 71). The notebook is divided into two sections, separated by a number of blank pages. The back side of the third page in the first section of pages lists a series of three columns of figures. The following is an illustration:

2484.40	13	26800
3735.54	14	1900
5876.05	15	M 10000 515000
		M HP 1100 49995
4684.20	16	16921

The figures to the left of the middle column represent the same "total amounts" tallied on the top summary sheets prepared by Sandra Brunton attached to the bingo packets from the Canton bingo hall on the dates of April 13, 14, 15 and 16.

The back side of the second page of the second section of the notebook also lists a series of columns as illustrated below:

1038.99	18	6500
3917.00	19	1700
3101.45	20	——
5613.41	21	12000

The figures to the left of the middle column are identical to the figures under the "total amounts" column on the

top summary sheets attached to the bingo packets from the Lakemore bingo hall on May 18, 19, 20 and 21, which were prepared by Brunton.

On some of the cover summary sheets attached to the bingo packets from the Canton and Akron bingo halls indicated that the expenses, i.e., payroll, concessions, church payments, etc., when they were made, were taken out of the cash received from the "cards" before the total amounts received from each of the games were added up.

The figures listed in the red notebook, as illustrated above, represented the amount remaining after some of the expenses were already paid. The column to the right of the middle or "date" column in the notebook indicates that payments were made from the remainder of the proceeds as listed on the left side of the page. References are made to "bills", "rent", J. UJ, Harry, P, M, S, Att, Attorney, R P, and Ray's pay along with numerous others.

The evidence also shows that Nancy Merlo kept records of some of the bingo games' activities (Transcript, pages 70-71).

Joan DiLaura, Susan Taylor, Lollie Patsy, Pam Callaghan and Janice Badini all were given money which had been photocopied by Detective Maurer of the Summit County Sheriff's Department. These people played bingo during the week following June 8, 1978. They used the "marked" (photocopied) money to purchase bingo cards.

Some of the "marked" money was later recovered from the searches conducted at various locations. Detective Bryant coordinated and summarized the collection of the bags and containers of money (State's Exhibit 70, 73, 74, 75, 94 and 99) (Miller Transcript, Volume III, pages 36-41). He summarized these exhibits on State's

Exhibit 102. The money contained in State's Exhibit 70 alone was in excess of $128,000.00 (Miller Transcript, Volume III, page 39).

Finally, Detective Bryant testified that he matched the previously photocopied bills (State's Exhibits 14-25) as described above, with currency found in State's Exhibits 70, 73, 74, 75, 94 and 99 (Miller Transcript, Volume III, pages 39-40). State's Exhibit 102, in summary form, reveals cash received at both bingo locations spread among nearly every person named in this indictment.

There can be no doubt that these two bingo games were the source of revenue for the named defendants. They were "skimming the cream", and retaining for themselves, that which they received in the name of charity.

RESPONDENT'S FIRST REASON FOR DENYING THE WRIT

AN EVIDENTIARY HEARING IS NOT REQUIRED WHERE AFFIDAVITS SUPPORT PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT.

The United States Supreme Court recently ruled in *Franks v. Delaware*, 438 U.S. 154 (1978), that a defendant could attack a search warrant only in a very limited instance. The court held that:

> To mandate an evidentiary hearing, the challenger's attack must be supported by more than a mere desire to cross-examine. *There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.* They should point out specifically the portion of the warrant affidavit that is claimed

> to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity of reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth Amendment, to his hearing. (Footnote citation omitted) (Emphasis supplied).

The State submits that the Petitioners have first failed to comply with the procedural requirements of *Franks v. Delaware, supra.* The Petitioners have failed to make a substantial preliminary showing that in fact there was any false statement or reckless disregard for the truth contained in the affidavit. *Franks v. Delaware, supra,* clearly establishes that minor discrepancies do not affect the validity of a warrant. Further, the statement must be more than a negligent or innocent mistake.

United States v. Moore, 522 F.2d 1068, 1073 further explains *Franks v. Delaware, supra,* as follows:

> Lee Moore next contends that there was ample other evidence of substantial misrepresentations in the Reginato affidavit to support his demand for an evidentiary hearing on the facts therein presented. Moore points out here, as he did in the trial court, that paragraph one of the affidavit states that the informer had

provided reliable information to the FBI on five occasions in the past, while paragraph nine recites that the informer had provided reliable information on only *two* past occasions. Additionally, Lee Moore argues that certain language in the affidavit could lead a careful reader to the conclusion that a vehicle described in certain of the factual allegations in the affidavit was not the same vehicle for which a search warrant was sought. In our view, the language of the affidavit approaches the "substantial showing of falsehood" that is required. *United States v. Harris,* 501 F.2d 1, 5-6 (9th Cir. 1974).

If the Court examines the affidavits of Mr. Palda, it will find that Mr. Palda only alleges discrepancies in Detective Maurer's affidavit for the search warrants. The discrepancies center around the fact that different bags were used to transport the money and attendance and receipts figures for the bingo games.

While the State does not concede that there are *any* mistakes, there is certainly no showing that the alleged mistakes were false or intentionally reckless. Nor do the alleged mistakes taken collectively reach the level, to require a hearing under *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421 (1978).

Finally, the State admits that assuming the alleged false statements are deleted, there is still a showing of probable cause to support the affidavit. Specifically, the false statement is, "that the same canvas bag was seen being taken from the bingo hall to different houses of the Petitioners". As corrected, the affidavit would still assert that there was a regular exchange of bags, although not described, which were transported from the bingo hall to the various houses and eventually to the Executive Townhouse. Based on this information, the State main-

tains that there would still be a showing of probable cause to support the affidavit. Mr. Palda's supplementary affidavit does not support facts sufficient to grant an evidentiary hearing under the *Franks, supra,* test. Mr. Palda asserts in his affidavit that there were no discrepancies in the reported attendance figures submitted by the Petitioners by the Attorney General. The State submits that an examination of both sets of figures will show definite discrepancies.

The attendance figures listed in the audit were invariably higher than those reported by the Petitioners to the Attorney General's Office. Assuming *arguendo* that the attendance figures were consistent, there is still a strong showing of probable cause since there is a large discrepancy in attendance figures estimated by the Sheriff's Department and those submitted by the Petitioners to the Attorney General in the affidavit.

RESPONDENT'S SECOND REASON FOR DENYING THE WRIT

A PLEA OF NO CONTEST PURSUANT TO A STIPULATION OF FACTS WAIVES THE RIGHT, AFTER ENTRY OF THE PLEA, TO CHALLENGE NO CONTEST PLEA.

Ohio Criminal Rule 11(B) provides that a "plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged . . ." It is inconsistent for the Petitioners to challenge the State's evidence on appeal after admitting the truth of that evidence at his plea. Ohio Criminal Rule 12(H) limits an appeal upon a "no contest" plea to pretrial motions. *Compare* Criminal Rule 29(A).

Should Petitioners be permitted to challenge the weight and sufficiency of evidence, the State submits that the evidence is sufficient to support the trial court's finding of guilt. Petitioner Joseph Merlo pled "no contest" to all four counts of the indictment. The court found him guilty of Engaging in Organized Crime [Revised Code 2923.04(A)(5)]; Conducting an Illegal Bingo Game [Revised Code 2915.09(A)(2)]; Grand Theft [Revised Code 2913.02(A)(2)(A)(3)]; and Gambling [Revised Code 2915.02(A)(2)] (Transcript, Volume V, page 83). Although circumstantial evidence was relied upon to prove the elements of the crimes, the State submits that the evidence was of such a conclusive and persuasive nature that there was no reasonable hypotheses of innocence.

It is settled that where circumstantial evidence alone is relied upon to prove an element essential to a finding of guilt, it must be inconsistent with the theory of innocence. *State v. Kuling,* 37 Ohio St. 2d 157, 169 (1974); *State v. Graven,* 54 Ohio St. 2d 114, 119 (1978). It is an accepted proposition that ". . . a fact may be proven to a moral certainty by circumstantial evidence as well as direct evidence." *State v. Graven, supra. State v. Nevius,* 147 Ohio St. 263 (1947).

The State presented evidence that bingo games were being conducted illegally in Canton (Boardwalk) and Akron (Lakemore Bingo) locations, and that the games were being operated to profit the individuals indicted in this case. The State submits that there was sufficient evidence of Merlo's involvement in the scheme to support the verdict. *State v. Eley* (1978), 56 Ohio St. 2d 169.

Evidence was presented that all of the Petitioners in this case, were involved in operating the bingo halls and skimming money from the gross receipts for their own profit.

Paula Brailer testified that she saw Joe Merlo at a bingo personnel meeting in September 1977, at the Lakemore Plaza in Akron. She stated that individuals named Harry Blackford and Ray were there also. Brailer remembered Joe Merlo from prior bingo meetings (Transcript, Volume II, page 133). The evidence presented indicated that Harry Blackford and Ray Parks were instrumental in helping the churches obtain bingo licenses. Each owned and managed companies which provided the games with the necessary supplies. Each Petitioner operated a bingo hall. The evidence derived from the surveillance and the search and seizures conducted by the Sheriff's Department was persuasive enough to support an inference that Joseph Merlo, his wife Nancy, and Cecilia Parks aided Blackford and Parks in the transportation of the money from the bingo halls and that the money was improperly and purposely withheld from the churches in violation of Ohio Revised Code 2915.09(A)(2). Members of the Summit County Sheriff's Office observed all of the Petitioners on occasion carried "full" canvas bags into the Merlo residence. Petitioner Merlo was observed by Officer Padrutt carrying a green canvas bag from his car into his apartment on April 30, 1978 (Transcript, Volume II, pages 410, 411). Several canvas bags, two of which were green, were seized from the house and car of Sandra Brunton (Merlo's sister), on June 11, 1978. All of the bags contained cash and bingo receipts (Transcript, Volume II, page 37). A suitcase containing $128,000.00 was also recovered from the apartment (Transcript, page 35). Some marked bills which had been previously spent at the bingo halls in Akron and Canton by prosecutor personnel were discovered in the suitcase (Transcript, page 39). State Exhibit 72, a small red notebook, was also seized from Brunton's residence and was stipulated to be in her handwriting.

The State asserts that the records seized from the Merlo and Brunton apartments, in addition to the audit by the Attorney General's Office, indicates that the operators of the bingo games were falsifying the reported income from the games and were depriving the churches of the proceeds.

The circumstantial evidence was of such a persuasive and convincing nature that there was no reasonable inference to draw from the circumstances except guilt.

RESPONDENT'S THIRD REASON FOR DENYING THE WRIT

EVIDENCE IS NOT REQUIRED TO BE SUPPRESSED PURSUANT TO A PROPERLY EXECUTED SEARCH WARRANT UNDER THE FOURTH AMENDMENT.

A. Suppression Was Not Required Because the Warrants Were Issued Without Probable Cause.

The Petitioners contend that the affidavit upon which the search warrants were issued contained only conclusory statements rather than facts, and was insufficient basis to justify a finding of probable cause in the issuance of the warrants.

Respondent maintains that the six page affidavit contained sufficient facts and circumstances to warrant a reasonable belief that probable cause existed.

In an effort to foster a proper judicial climate that encourages the use of warrants, as opposed to warrantless searches, decisions have been liberal in upholding the actions of officers who have proceeded by warrant. *Aguilar*

v. Texas, 378 U.S. 108 (1964). There is, therefore, a presumption of regularity and validity with respect to an affidavit supporting a search warrant. *Franks v. Delaware,* 438 U.S. 154 (1978).

Because the term "probable cause" means less than evidence which will justify conviction and may rest on evidence not legally competent in a criminal trial, the affidavit upon which probable cause is found and the warrant is issued, may be based on hearsay and need not reflect direct personal observations of the affidavit so long as the magistrate determining "probable cause" is informed of some of the underlying circumstances supporting the affidavit's conclusions. *United States v. Ventresca,* 380 U.S. 102 (1965).

Affidavits for search warrants are governed by less stringent rules than those dealing with admissibility of evidence in criminal trials. *State v. Karr,* 44 Ohio St. 2d 163, 339 N.E.2d 641 (1975). The affidavit need not make out a prima facie case against the Petitioners nor is it necessary that the magistrate be convinced beyond a reasonable doubt. *State v. Dodson,* 43 Ohio App. 2d 31, 332 N.E.2d 371 (1974). In evaluating the facts and circumstances presented in the affidavit, the magistrate deals only with probabilities rather than certainties. *United States v. Swihart,* 554 F.2d 264 (6th Cir. 1977).

In the present case, the search warrant affidavit provided the magistrate with many circumstances and facts to support a finding of "probable cause". The affidavit for the search warrant lists seventeen separate locations or automobiles to be searched. The individual designations of the places to be searched are listed with particularity. The knowledge portion of the affidavit is three pages in length containing ten paragraphs. The information sub-

mitted by the affidavit establishes bingo games being operated at two locations.

The affidavit further denoted that data obtained from the Ohio Attorney General's Office indicates that the average daily gross receipts reported by Lakemore Plaza Bingo was $4,174.00 with attendance of 300-400 people. Formal audits by the Attorney General's Office showed gross receipts of $8,387.30 on March 23, 1978, and $6,833.00 on March 24, 1978, representing a difference of $4,213.30 and $1,659.00 between the formal audit figures and the average daily reported figures. To further support the existence of discrepancies between the figures reported to the Attorney General's Office and the gross receipts and attendance, the affiant, personally, and other police officers, on more than twenty occasions observed the crowd at the bingo halls and estimated them to be composed of 400 to 650 people, a difference of 100-250 between the reported number and the police estimates. By using the police crowd estimate and figures provided by the Attorney General's Office, the affidavit figured that the average gross receipts should be more than $6,000 to $9,000 per night, figures far exceeding the reported average of $4,174.00.

The affiant provided the above evidentiary facts to demonstrate the ultimate fact—the discrepancy between the figures reported to the Attorney General by the Petitioners and the actual figures. Contrary to the Petitioners' claim of lack of factual material in the affidavit, the affiant may have provided much more factual data than necessary. The magistrate need not be given all the evidentiary facts that leads the affiant to the ultimate fact. Ultimate facts here, the discrepancy, may properly provide the basis for the magistrate's independent judgment. *State v. Eichhorn*, 47 Ohio App. 2d 227, 353 N.E.2d 861 (1975).

Although the above discrepancies alone may have been sufficient to establish probable cause that a crime was being committed, the test is not whether any one bit of information by itself provides the basis for finding probable cause but whether the sum total so does. *State v. Eichhorn, supra.* The affiant therefore offered further facts relevant to exorbitant charges to the charities for bingo supplies and the relatively small sums paid to the holders of the licenses for the operation of the bingo halls. He also offered facts relative to the transportation of books, records and money based on personal observation and the observation of other police officers during several days of surveillance of the bingo halls and the residence of the suspects.

The affiant is not subject to question merely because other officers were involved in the surveillance and crowd estimates. Observations by fellow officers engaged in a common investigation, as here, are plainly a reliable basis for a warrant applied for by one of their number. *United States v. Ventresca, supra.*

All of these facts and circumstances denoted in the affidavit when considered together are sufficient to warrant a man of reasonable caution in the belief that a crime was being committed. An independent magistrate, using his independent judgment based on the facts in his possession, is permitted to draw reasonable inferences from which probable cause can be concluded. *State v. Eichhorn, supra.*

The State submits that the court must review the affidavit in a common sense fashion. The affidavit should not be reviewed in hypertechnical fashion. *State v. Karr, supra, United States v. Ventresca, supra.* The Petitioners cite to this Court the case of *State v. Graddy* (1978), 55 Ohio St. 2d 132. The *Graddy* case can be distinguished on

two grounds. *First*, the *Graddy* case dealt with the reliability of an informant. In this case, there is no informant involved. The affidavit is based on the affiant's personal observations and reports which he has reviewed. The second basis on which *Graddy* can be distinguished is that the court concluded that the informant gave insufficient information to determine whether he was reliable. The court further indicated in *Graddy* that under that particular affidavit, the problem was not with "sufficiency of detail of the underlying circumstances disclosed but a complete omission of *any* of the circumstances" from which probable cause may be concluded.

Great deference even in doubtful cases must be given by courts to the determination of probable cause by the magistrate, and that determination should not be set aside unless arbitrarily exercised. *United States v. Swihart, supra.* In the present case, there was clearly no arbitrariness in the magistrate's finding of probable cause because the finding was more than adequately supported by the total facts and circumstances related in the affidavit by Detective Maurer. Therefore, the finding of probable cause was proper, the search warrant was valid, and the evidence obtained pursuant to the execution of the warrant was properly admitted at trial.

B. Suppression Was Not Required Because the Warrants Were Not Overbroad and Vague.

The Petitioners contend that the warrant was so lacking in specificity and particularity in regard to the items to be seized that it in effect constituted a general warrant and, therefore, the evidence seized thereunder should be suppressed.

Respondent maintains that because of the nature of the items authorized to be seized, the warrant is sufficiently specific and particular in its description.

The general rule stated in *Marron v. United States,* 275 U.S. 192 (1927), is that the warrant must particularly describe the place to be searched and the persons or things to be seized such that nothing is left to the discretion of the officer executing the warrant. Since the *Marron* decision, the courts have realized that there are exceptions to the broadly stated doctrine. *United States v. Maude,* 381 F.2d 1062 (D.C. Cir. 1973). An exception which *Marron* itself recognized exists where upon execution of a search warrant, a person is arrested on the premises is independently justified as incident to the arrest. *Marron v. United States, supra.* Another exception now accepted is the "plain view" doctrine which permits an officer executing a warrant to seize incriminating evidence he may inadvertently come across in the course of the search. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

Just as the scope of the seizable items not specifically listed in the warrant has been broadened, so too has the degree of specificity and particularity required in the description of certain classes of items to be seized. The degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances involved and types of items involved. *United States v. Davis,* 542 F.2d 743 (1976).

Hypertechnicality of the particularity requirement has yielded to the practical necessities of law enforcement. Where the precise identity of the goods cannot be ascertained at the time the warrant is issued, naming only the generic class of items will suffice. Less particularity can be reasonably expected than for such items as stolen goods whose exact identity is already known at the time of issuance. *United States v. Johnson,* 541 F.2d 1311 (8th Cir. 1976). Thus, where the items to be seized are those

such as gambling equipment and the identity cannot be specifically ascertained, the courts have found to be sufficient in the warrant, such terms as "bookmaking paraphernalia," [*Spinelli v. United States*, 382 F.2d 871 (1967)]; "gambling paraphernalia" [*Nuckols v. United States*, 99 F.2d 353 (1938)]; and merely "paraphernalia" in the generic sense with no modifier where it is determined that both the officers and Petitioners were in actuality advised of what was meant [*United States v. Johnson*, 541 F.2d 1311 (1976)].

The language contained in the search warrant now being attacked by the Petitioners, authorizing seizure of:

> Supplies, books and records and proceeds of illegal games and gambling paraphernalia

is more than adequate to meet the specificity requirement when interpreted practically and reasonably. In fact, in light of the *Spinelli* and *Nuckols* decisions, the term "gambling paraphernalia" alone may have been sufficient. Where as here, the items are gambling equipment as in *Spinelli, supra,* and the circumstances and the nature of the items make it virtually impossible for officers to know precisely what gambling equipment and devices were present to be seized, a hypertechnical description in the warrant was not possible (*See Johnson, supra*).

In support of his argument, Petitioners cite the case of *Stanford v. Texas*, 379 U.S. 476 (1965). The warrants in that case were for seizure of literary material containing ideas and propaganda of the Communist Party. The court in *Stanford* stated that the requirement of particularity is to be reviewed more scrupulously when the "thing" to be seized is the ideas which they contain. The court further indicated that had the descriptions in the warrant been of other materials the warrants may have

met the particularity requirement. The court emphasized that their decision was limited solely to warrant's for literary material.

In the present case, the "books and records" indicated in the warrant were not literary material but accounting instruments. There is no underlying First Amendment Rights here. Therefore, *Stanford* has no applicability to the present case.

Clearly then, by evaluating the language of the warrant in the present case, in light of the existing case law the descriptions of the items to be seized were not overbroad and vague, but were of sufficient "specificity and particularity" to support the validity of the warrant. Therefore, the evidence seized thereunder was properly admitted at trial.

C. Suppression Was Not Required Because the Seizures Were General and Exploratory, Beyond the Scope of the Warrant.

The Petitioners assert that the searches conducted by the Sheriff's Department were illegal because the officers' search went beyond the scope of the warrants. The State contends that Petitioners' assertion is not supported by the record in this case.

The search warrants which the Sheriff's Department used in this case stated:

> *Inter alia*
>
> WHEREAS, there has been filed before me an Affidavit demonstrating probable cause for a search to be made of:
>
> . . . .

for certain property, namely:

Supplies, books and records and proceeds of illegal games and gambling paraphernalia,

which is evidence of the commission of a criminal offense, or fruits of that crime, to-wit:

Engaging in Organized Crime and Conducting an Illegal Bingo Game.

The issue now before the court is whether the seizure of personal items not named on the warrant should invalidate the entire search. Although this question seems to be one of the first impression in Ohio, the United States Fifth Circuit Court of Appeals has ruled that the seizure of items not within the scope of the warrant will not affect those items lawfully seized. *United States v. Mendoza,* 473 F.2d 692 (1972).

In *Brooks v. United States,* 416 F.2d 1044 (5th Cir. 1969), *cert. denied,* 400 U.S. 840 (1970), the court held that the seizure of personal items not named in the warrant (clothing and toilet articles) did not invalidate the legal seizure of articles named in the warrant.

The State courts in Washington have also held that the illegal seizure of items not used against the Petitioners at trial is not grounds for invalidating the entire search. *State of Oregon v. Roninger,* 492 P.2d 298 (1971); *State of Oregon v. Redeman,* 496 P.2d 230 (1972).

Further in *Marron v. United States, supra,* the court *sustained* the search, which included gas bills and other items held to be not within the scope of the warrant. These type of items are the same as complained of herein by the Petitioners.

The evidence introduced from the searches in this case consisted of money, books, and records of the bingo

games; nothing more then commanded by the warrants. The personal items were not introduced, but were in fact returned to the Petitioners. Accordingly there was no prejudice to the Petitioners. *United States v. Mendoza, supra.*

Petitioners' claim that the scope of the search was so far beyond the command of the warrant to invalidate it is not justified. Petitioners cite *Kremen v. United States,* 353 U.S. 346 (1957). In that case, the F.B.I. seized the entire contents of the house, including all the kitchenware, spices, and all the Petitioners' clothing. The search in *Kremen, supra,* does not compare with the search herein.

Nor can Petitioners properly rely on *Marcus v. Search Warrant,* 367 U.S. 721 (1961); *Stanford v. Texas,* 379 U.S. 476 (1965). While these cases are couched in the Fourth Amendment freedom from unreasonable searches, they seek equally to protect First Amendment Rights. *Marcus, supra,* 724, 729, and *Stanford, supra,* 484-485.

Although the Petitioners cite several cases pertaining to indiscriminate searches and seizures by police officers, none of the cited cases supports their argument that property lawfully seized according to a valid search warrant should be suppressed when personal items have also been mistakenly seized in the search. In *W.S. v. Rettig,* 589 F.2d 418 (1978), the court found that the intent of the officers was to search for items *not* listed in the warrant. Since the officers conducted a search for items not named in the warrant, the court held that the nature of the search was exploratory and that all of the items seized should be suppressed. In the case now before the court, there is no evidence that the officers intended to seize any property that was unrelated to the bingo operation. Any of the personal property taken was mistakenly seized because of the large amount of evidence that related to the bingo games.

Since the personal property was not intentionally taken, the suppression of all of the items seized would not serve any deterrent purpose. The entire rationale of the exclusionary rule is to deter police from invading an individual's right to privacy. *Mapp v. Ohio,* 367 U.S. 643 (1961).

The Respondent strongly contends that the seizure of a small amount of personal property should not invalidate the entire search. Since these items were inadvertently taken, there would be no deterrent effect in excluding evidence which was lawfully taken according to a valid search warrant.

RESPONDENT'S FOURTH REASON FOR DENYING THE WRIT

A CRIMINAL STATUTE PROVIDING ASCERTAINABLE STANDARDS OF GUILT COMPORTS WITH CONSTITUTIONAL DUE PROCESS.

Petitioners' contentions are construed as follows:

> Faith, I have been a truant in the law,
> And never yet could frame my will to it.
>
> Shakespeare, First Part of *King Henry VI.* Act ii, section 4.

Therefore, if Petitioners cannot conform their will to the statutory law, they would anticipate the law conforming to suit them.

The State submits that Petitioners' constitutional arguments are a mere cloak of convenience designed to obscure the real issues. Petitioners rely heavily on the legality of expenditures phrase in Revised Code 2915.09(A)(2):

> . . . provided that the amount of the receipts so spent is not more than is customary for a similar purchase, lease. . .

The crux of this case is not what was spent for the various statutorily listed expenditures, which are in fact set forth in a manner sufficiently clear so that "men of common intelligence need not guess at the meaning"; it is the huge sums of money diverted into Petitioners' personal coffers. *See Connally v. General Construction Co.*, 269 U.S. 385, 391 (1925). Petitioners would have the Court regard the total cash seized pursuant to the authorized search warrants as money indicative of "necessaries", whether or not they are "customary or reasonable". The $159,550.08 seized during the search, which contained marked bills from the bingo games, is not even addressed by the question Petitioners have presented. To use Petitioners' own argument, is it "customary" or "reasonable" to store $128,000.00 in a red suitcase when Petitioners have full knowledge that all the gross receipts are to be used in a legitimate manner and not for personal gain? Petitioners are not being punished for violating an "unknowable something". *Screws v. United States,* 325 U.S. 91 (1945); *United States v. Gypsum,* ..... U.S. ....., 98 S. Ct. 2864, 2873 (1978); *Brown v. Concerned Citizens, Inc.*, 56 Ohio St. 2d 85 (1978).

In view of these circumstances, it is impelling that if at all possible Revised Code 2915.09 may be allowed to serve its purpose. Petitioners, however, assert the position that this statute is vague.

Petitioners rely heavily upon *Calautti v. Franklin,* 439 U.S. 379, 99 S. Ct. 675 (1979), as dispositive of the issue of void for vagueness. This case is distinguishable in various respects. The State submits one simple equation as the salient distinction, to-wit: Bingo does not equal

babies. Statutes dealing with fundamental rights as in *Calautti,* are given rigid scrutiny by the courts. As it is, the court cannot even set a standard for viability in that case:

> Visibility is a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term. *Calautti,* at 682.

The Court rejected the contention that a specific number of weeks in pregnancy must be fixed by statute as the point of visibility. *Compare,* Petitioners' arguments regarding legally fixed standards. A standard of absolute mathematical precision is neither reasonably attainable nor constitutionally mandated herein.

The intrinsic difficulties of language, and the emergence after enactment of situations not anticipated by the most gifted legislative imagination reveal doubts and ambiguities that very well compel judicial construction. The State submits that there is no canon against using common sense in construing laws as saying what they obviously mean. Justice Holmes, *Roschen v. Ward,* 279 U.S. 337, 339 (1929). The language of Revised Code 2915.09 is comprehensive language which can justify unforeseen expenses by bingo licensees, but it does not justify in any respect fleecing the lambs of the Lord's flock (i.e., the charitable organizations). The court should avoid a construction that would seriously impair effectiveness in coping with a problem which the legislative seeks to alleviate. *United States v. Harriss,* 347 U.S. 612, 617 (1954). *State ex rel. Dickman v. Deffenbacker,* 164 Ohio St. 142 (1955).

Petitioners' discussion of *United States v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921), is inapplicable here in view of the fact that expenses, whether customary or not, are not the issue. The standard of guilt, or the deter-

mination of scienter is not based on how much Petitioners spent on bingo cards or other purchases, per se; it is the funds that were illegally retained by Petitioners.

Only a word need be said regarding *City of Columbus v. Thompson,* 25 Ohio St. 2d 26 (1971). A suspicious person ordinance is a statute of the type to control vagrancy and are in a class by themselves, clearly distinguishable from statutes relating business type activities which are limited to a narrow category of conduct.

In conclusion, Petitioners' arguments of vagueness in regard to warning men of their conduct ignores the nature of the criminal act itself. A mind intent upon wilful evasion is inconsistent with surprised innocence. *United States v. Ragen,* 314 U.S. 513, 524 (1942).

Petitioners seek only to obscure their deeds with a cloak of constitutional protection. Such a garment becomes very transparent upon analysis, i.e., Petitioners present the case of "the Emperor's New Clothes".

CONCLUSION

Petitioners failed to state any substantiated constitutional questions. The issues presented have been well settled by this Court. Therefore, Petitioners' Writ of Certiorari should be denied.

Respectfully submitted,

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